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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SCOTT LYNN CHRISTENSON

Petitioner,

—v.—

TONY TURPIN, Warden
Georgia Diagnostic and Classification Center,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a defendant in a capital murder trial receives constitutionally inadequate assistance of counsel if his trial counsel in the opening statement makes representations known by counsel to be baseless and false, highly prejudicial to the defendant and defamatory of the victim, and as to which counsel could and did offer no supporting evidence, to the effect that the victim's death occurred during a failed drug deal in which the victim sought homosexual sex from the defendant.

2. Whether a defendant in a capital murder trial in which there is no eyewitness evidence receives constitutionally inadequate assistance of counsel if his trial counsel fail to object to the admission at trial, without curative instruction, of an extensive videotaped statement which depicts the defendant in shackles, jail attire and under the supervision of visibly armed law enforcement officers in violation of his fundamental right to be presumed innocent in the minds and eyes of the jurors.

3. Whether the cumulative effect of the errors, deficiencies and failures of trial counsel to a defendant in a capital murder trial so undermines confidence in the validity of the jury verdict in the guilt/innocence phase of a capital murder trial as to constitute a violation of a criminal defendant's rights under the Sixth and Fourteenth Amendments to the Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SCOTT LYNN CHRISTENSON

Petitioner,

—v.—

TONY TURPIN, Warden
Georgia Diagnostic and Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner, Scott Lynn Christenson, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Georgia, entered by the Butts County Superior Court on April 28, 1998.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at *Turpin* v. *Christenson*, 261 Ga. 226, 497 S.E.2d 216 (Ga. 1998), and is reprinted in the appendix hereto at pages A1 through A25. The opinion of the Trial Court for Butts County is unreported and is reprinted in the appendix hereto at pages A28 through A77.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 16, 1998 and became the judgment of the Butts Superior Court on April 28, 1998. The Supreme Court of Georgia denied Mr. Christenson's and the State of Georgia's motions for partial reconsideration on April 1, 1998. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

The Fourteenth Amendment of the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Trial and Direct Appeal

On March 23, 1990, Scott Lynn Christenson was convicted by a jury in the Superior Court of Harris County, Hamilton, Georgia of murder and armed robbery arising out of the death of Albert L. Oliver, III and the theft of Mr. Oliver's truck. On the following day, the same jury rendered a verdict imposing a sentence of death on Mr. Christenson. On direct appeal, the Georgia Supreme Court affirmed the guilty verdict and remanded the sentence to the trial court for a hearing on two penalty-phase issues: whether the prosecutor had a good faith basis for certain questions asked of defense witnesses concerning prior offenses and whether

Mr. Christenson's supposed confession to an extrinsic crime was voluntary and admissible. *Christenson* v. *State*, 261 Ga. 80, 402 S.E.2d 41 (1991). A petition for writ of certiorari to this Court was denied. *Christenson* v. *Georgia*, 502 U.S. 855 (1991). On remand and after recusal of the initial trial judge and reassignment to another judge, the trial court found that the prosecutor's questions were proper and that Mr. Christenson's confession was properly admitted. The Georgia Supreme Court thereafter affirmed Mr. Christenson's death sentence. *Christenson* v. *State*, 262 Ga. 638, 423 S.E.2d 252 (1992). Mr. Christenson again unsuccessfully petitioned this Court for a writ of certiorari. *Christenson* v. *Georgia*, 508 U.S. 927 (1993).

B. The Proceeding in the Superior Court

Mr. Christenson filed a petition for writ of habeas corpus on October 31, 1995 and filed an amended petition on May 3, 1996. The Superior Court of Butts County (per Judge William A. Foster, III, sitting by designation) conducted a hearing on the merits on June 4, 5, 6 and 18, 1996. Mr. Christenson presented the testimony of two experts in the mental health field and one expert in the field of firearms and ballistics, the affidavits and depositions of more than fifty fact and opinion witnesses, as well as the entire trial record and numerous additional exhibits. (*See* Order of Judge William A. Foster, III, Superior Court of Butts County, Georgia, entered April 14, 1997 (the "Order") at ¶ 1 (A28-A29). The respondent presented the testimony of Mr. Christenson's two trial attorneys and (by deposition) one of his attorneys on the direct appeal and introduced several exhibits. (*Id.*)

On April 14, 1997, the Superior Court granted the portion of Mr. Christenson's petition for writ of habeas corpus seeking invalidation of his death sentence. (*See* A77.) The court found that Mr. Christenson's trial attorneys were ineffective in the pre-trial, guilt/innocence and penalty phases of the trial, but concluded that Mr. Christenson suffered prejudice of constitutional dimension only with respect to sentencing. (*See* Order generally.)

1. Pre-Trial Phase

The Superior Court made several findings regarding defense counsel's ineffectiveness during the pre-trial phase. First, the court found that, despite abundant evidence that Mr. Christenson suffered from serious mental health problems and had a troubled relationship with his parents, "defense counsel engaged in little active investigation of the case beyond talking to Christenson himself and his father." (A66) Second, the court found that following the denial of Mr. Christenson's motions for funds for the assistance of a psychiatric expert and investigator, defense counsel "abandoned any inquiry into any mental health issues and delayed or failed to speak with witnesses." (*Id.*) Third, the court found that the "absence of such important preparation tools rendered them ineffective to meet the state's case." (*Id.*) Fourth, the court found that defense counsel had "failed to ensure that they adequately understood available materials before making the decision to abandon further investigation and evaluation of evidence of mental illness. Accordingly, their decision that there was nothing in Christenson's family background or psychological makeup which would help the case in mitigation cannot be defended as a reasoned strategic decision." (A69) The Superior Court concluded that "counsel's performance was deficient in summarily abandoning the mental health issues and that such failure, together with counsel's other errors, prejudiced the defense." (*Id.*)

2. Guilt/Innocence Phase

The Superior Court also found deficiencies in defense counsel's performance during the guilt/innocence phase of the trial. That court found that the principal theory presented to the jury by defense counsel was a fabrication for which counsel neither had, nor presented, evidence. Counsel's prevarication centered on the defamatory representation in the opening statement that the defense would prove that Mr. Oliver was killed in the course of a failed drug deal in which Mr. Christenson attempted to trade guns for drugs, but Mr. Oliver instead had demanded payment in the form of homosexual sex with Mr. Christenson. (*See* A71-A72.) The

Superior Court further found that "trial counsel's performance was deficient in that both of these propositions were supported with little or no evidence and weak, unpersuasive arguments" (A71), and that trial counsel's "performance was deficient in attempting to tar Oliver's character because the jury was likely to be offended by the defense's unsupported aspersions against the character of the deceased and therefore less inclined toward mercy in their penalty deliberations." (A72)

The Superior Court did not address Mr. Christenson's contention that trial counsel's performance was deficient in one respect particularly relevant to this Petition: Trial counsel had failed to object to the admission (either at all or without curative instruction) of a cumulative, incriminating videotaped statement by Mr. Christenson that depicted Mr. Christenson shackled, in jail attire and under the supervision of a visibly armed law enforcement officer. Although it concluded that trial counsel had committed numerous errors in connection with their representation of Mr. Christenson during the pre-trial and guilt/innocence phases of his capital proceedings, the Superior Court concluded that counsel's failures and mistakes in those phases "did not prejudice the defendant as to the determination of guilt but that the effect of the deficient performance carried over to the jury's deliberations during the penalty phase and rendered the resulting death sentence unreliable." (*Id.*)

3. Penalty Phase

In connection with the penalty phase, the Superior Court found that "defense counsel committed other serious errors" with regard to the presentation of mitigation evidence. (A74) The court found that trial counsel's performance was "deficient in preparing and presenting witness' testimony in support of their mitigation argument" and in preparing witnesses for cross-examination. (*Id.*) The Superior Court further found that the mitigation witnesses' testimony was "very brief and gave the jury little chance to form an impression of the witness or the witness' feelings for Christenson.

Accordingly, the witnesses' testimony gave scant support to counsel's attempt to humanize Christenson." (*Id.*)

The Superior Court also found numerous defects in trial counsel's final argument:

- "By admittedly breaking their promise to explain how Christenson came to kill Oliver, emphasizing that even *his own lawyers* were baffled, trial counsel did nothing to counter the prosecution's outraged argument that the murder was completely deliberate and cold-hearted and therefore supremely deserving of the ultimate penalty." (A74-A75 (emphasis in the original))
- "By failing to develop any coherent explanation for why a good person committed such bad acts, defense counsel permitted the prosecutor to turn the positive mitigation evidence against Christenson and argue that because Christenson had grown up with 'all the opportunities' he was even more culpable and deserving of death." (A75)
- "[B]y frequently reminding the jury that Christenson had committed a 'horrible crime' for which there were 'no excuses' yet expressly disavowing any request for mercy for him, defense counsel distanced themselves from their client and sabotaged their argument that he could be redeemed and rehabilitated." (*Id.*)

The Superior Court concluded that "in the totality of this case Christenson has overcome the strong presumption that his trial counsel rendered adequate assistance and has shown that his trial counsel's performance was deficient and that the deficient performance prejudiced his defense" (A76), and that "there is a reasonable probability that, but for the cumulative effect of counsel's unprofessional errors, the result of the sentencing proceeding would have been different and the jury would not have recommended death." (*Id.*)

C. The Opinion of the Georgia Supreme Court

Following an appeal by respondent Turpin and a cross-appeal by Mr. Christenson, the Georgia Supreme Court affirmed the decision of the Superior Court on March 16, 1998 (the "Ga. Order") and denied the parties' respective partial motions for reconsideration on April 1, 1998. With respect to the issue of ineffectiveness of counsel at the guilt/innocence phase of the trial, the Georgia Supreme Court held that Mr. Christenson "cannot meet the prejudice prong of *Strickland* v. *Washington*, 466 U.S. 668 (1984). Although Christenson's counsel's preparation for and conduct of the guilt/innocence phase included errors and omissions, the evidence of Christenson's guilt was overwhelming." (A10) In sustaining the Superior Court's findings regarding Mr. Christenson's trial counsel's ineffectiveness on the penalty determination, the Georgia Supreme Court concluded that "[t]rial counsel committed a number of serious errors that hurt their case for a sentence less than death." (*Id.*) With respect to the fabrications in Mr. Christenson's counsel's opening statement, the Georgia Supreme Court held that "trial counsel's argument in the guilt/innocence phase that the victim was a drug-dealing homosexual, without any evidence to support this assertion, could only have prejudiced the jury against their client." (*Id.*) The Georgia Supreme Court also faulted trial counsel for failing properly to impeach critical testimony from the sole witness offered in aggravation, for failing to object to the State's assertions that Mr. Christenson's supposedly continued to shoot at Mr. Oliver until he fired a fatal shot even though those "comments were unsupported by the trial evidence," and for failing to ask mercy for their client in closing argument and implying that their client did not deserve mercy. (A20) The Georgia Supreme Court concluded that the "evidence supports the habeas court's conclusion that, but for trial counsel's deficient representation, there exists a reasonable probability that the jury would have recommended life imprisonment." (A21)

REASONS FOR GRANTING THE WRIT

I.

The Georgia Supreme Court Erred in Not Reversing Mr. Christenson's Conviction on the Ground that the Presentation of the Knowingly False, Inflammatory and Baseless Homosexual Sex and Drugs "Defense" Was Both Ineffective *and* Highly Prejudicial in Violation of Mr. Christenson's Sixth Amendment and Fourteenth Amendment Rights.

In *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), this Court adopted a two-pronged test to determine whether the performance of counsel is so deficient as to abridge a defendant's Sixth Amendment rights:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Mr. Christenson has satisfied both prongs with respect to both the death sentence and his murder conviction. Mr. Christenson's court-appointed defense counsel, William Kirby and Richard Bunn, alienated the jury from the outset of trial by making a representation to the jury that they knew to be both baseless and defamatory: that Mr. Oliver was a drug-dealing homosexual who had been shot during a failed drug transaction with, and sexual advance toward, Mr. Christenson. Mr. Kirby delivered this assertion in his brief opening statement, which consisted largely of a list of supposed "mistakes" that, he suggested, Mr. Christenson had made:

> The first mistake, he used drugs and *he bought some of the drugs that he used from Albert Oliver.*
>
> The second mistake, he stole two pistols from his father and *he intended to use those pistols to trade for drugs.*
>
> The third mistake, he tried to trade the guns to Albert Oliver for the drugs, *but Albert Oliver decided that he didn't want the drugs, he wanted sex, from him (indicating [to Mr. Christenson]).*
>
> The fourth mistake, the defendant wouldn't get out of Albert Oliver's truck when Albert Oliver wanted him to. *He fought with Albert Oliver and Albert Oliver got shot once in the leg.*

(A78-A79 (emphasis and brackets supplied))

Mr. Kirby knew at the time he made these assertions that he neither had nor would offer any evidence to support the claim that Mr. Oliver had been involved with drugs or homosexual sex, let alone that drugs or homosexual sex had played any role in Mr. Oliver's death. Because no such evidence was presented at trial, Mr. Kirby was forced in his closing argument to retreat, and to apologize for his failure to prove what he had told the jury he would prove. (A80) Mr. Kirby noted that the defense had proffered as exhibits an unopened condom package, an empty condom wrapper found in Mr. Oliver's truck and two boxes of condoms found in Mr. Oliver's apartment. (*See id.* A81-A82.) Mr. Kirby added that Mr. Oliver was an "unmarried" 31-year-old man who lived in his own apartment (A82), that Mr. Christenson's statements suggested that he and Mr. Oliver had been in a "secluded spot" (*id.*), and that some of Mr. Oliver's friends were teenage boys (A83). Based on these observations alone, Mr. Kirby concluded:

> It's difficult and I don't think anyone would take any pleasure in attempting to besmirch the character of the deceased and he is not able to defend himself verbally before you.

(A81) In the end, Mr. Kirby effectively conceded to the jury that he could not tell them what connection that purported "evidence"

had to the matters at issue, suggesting only that the jury "consider [the information] and come to what conclusions [it] may." (A82)

The record evidence is clear that when Mr. Kirby uttered his opening statement, he knew that there would be no evidence introduced to suggest any drug use or proposed drug transaction between Mr. Christenson and Mr. Oliver. (A87) As Mr. Kirby conceded at the habeas corpus hearing, his "investigation" had not uncovered "any use of drugs, any reference to drugs with [Mr. Oliver]," or any evidence to substantiate such a claim. (A88-A89) Mr. Bunn was even more definitive: Trial counsel had no evidence that Mr. Oliver was involved in dealing drugs. (A90) To the contrary, the evidence of record at trial was that Mr. Oliver was a 31-year old college graduate with no criminal record and had held steady, full-time employment as a project manager at a local construction company. (A91)

Mr. Kirby admitted that, before his opening statement, he already had chosen not to put Mr. Christenson on the stand for any purpose, much less to testify about any drugs or drug transactions involving Mr. Oliver. (A92) Inasmuch as there were no witnesses to the shooting, counsel knew that there was no one else who would or could testify as to the circumstances of Mr. Oliver's death. Thus, no "evidence" as to any association between Mr. Oliver and drugs was or could have been offered at trial. (A93) This baseless and defamatory "defense" was ineffective.

Both Mr. Bunn and Mr. Kirby testified that they knew there would be no evidence to support the aspersions that Mr. Kirby had cast on Mr. Oliver's sexual behavior. Mr. Bunn testified unequivocally that Mr. Christenson himself had denied that Mr. Oliver's death had anything to do with sex between the two men:

> Q. Did you ask [Mr. Christenson], for example -- was one of the rumors that the victim was homosexual?
>
> A. Yes. And we -- Bill confronted him about that. I was there when he asked him about that, and at that point Scott

> denied that, denied that there was any involvement like that.

(A94)

Trial counsel had no evidence to suggest that Mr. Christenson was deceiving them in this regard. What minimal investigation counsel had undertaken confirmed that there was no evidence consistent with counsel's fabrications regarding Mr. Oliver's sexual activities. (*See* A95-A96.) Mr. Bunn also conceded at the habeas corpus proceeding (the "Habeas Hearing") that neither he nor Mr. Kirby had *any* evidence of the decedent's homosexuality (or bisexuality). (A97-A99; *see also* A100 (agreeing that trial counsel had no evidence that Mr. Oliver was a homosexual or was engaged in homosexual activity).)

The Superior Court referred to the baseless and inflammatory opening statement as emblematic of the "deficient" performance of trial counsel in presenting a defense case during the guilt/innocence phase of Mr. Christenson's trial. (*See* A71-A72.) The Superior Court's conclusion that this particular "deficiency" was not so prejudicial as to warrant a new trial as to Mr. Christenson's guilt, however, was incorrect. First, trial counsel themselves conceded during the Habeas Hearing that (1) Mr. Kirby's opening argument, without foundation or evidence, accused the deceased of two felonies under Georgia law (sodomy and drug dealing) (A101-A103); (2) that the jurors at Mr. Christenson's trial in rural Harris County, Georgia, were highly conservative holders of "Republican Party values" who did not condone drug dealing or homosexuality (A104, A105-A106), and (3) the opening argument was "the only time [the defense] seemed to get anybody's attention" (A107). Second, the prosecutor made sure that the jurors focused on the nature and lack of foundation of trial counsel's defamations. In closing argument during the guilt/innocence phase, the prosecutor argued: "Mr. Kirby accused a dead man, who certainly cannot speak for himself, of being a homosexual and a drug dealer. He, *once he did that, while there was no burden on him, should have undertaken to prove that*." (A84 (emphasis added)). The prosecutor then

reminded the jury that the conduct of Mr. Christenson's trial counsel was "absolutely unconscionable, totally unconscionable." (*Id.*)

Where the assertion of a baseless defense can only mystify, and, in the description of the trial observers, "shock and anger," the jury, counsel's ineffectiveness undermines any confidence in the outcome of the trial. *See Wade* v. *Calderon*, 29 F.3d 1312, 1325 (9th Cir. 1994) (granting *habeas corpus* relief because, *inter alia*, counsel's defense theory was "presented in a manner that clearly risked alienating the jury"), *cert. denied*, 513 U.S. 1120 (1995); *Young* v. *Zant*, 677 F.2d 792,798 (11th Cir. 1992) (granting *habeas corpus* relief because "competent counsel would not have gone to trial on an insanity defense without evidence to support it"); *House* v. *Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984). Trial counsel's performance was, therefore, deficient and prejudicial within the meaning of *Strickland*, and Mr. Christenson's conviction should be vacated.

II.

The Georgia Supreme Court Erred in Not Concluding that Trial Counsel Were Ineffective in Violation of Mr. Christenson's Sixth Amendment and Fourteenth Amendment Rights in Failing to Object to the Admission, without Curative Instruction, of an Extended Videotape Statement in which Mr. Christenson Appeared in Shackles, Jail Attire and under the Supervision of a Visibly-Armed Law Enforcement Officer.

At Mr. Christenson's trial, the jury watched a twenty-two minute videotape in which Mr. Christenson appeared in prison garb -- including a shirt with the words "Muscogee County Jail" emblazoned in large letters across his chest -- *and* back handcuffs and shackles, while he was accompanied by an armed law enforcement officer whose sidearm was clearly visible on the tape. No evidence was offered -- nor does any exist -- that there was any

need for Mr. Christenson to have been presented to the jury in that fashion. The State's presentation of the videotape was unnecessary, given that incriminating written and audio-taped statements were available to the prosecution and admitted into evidence. More important, the appearance of Mr. Christenson shackled, wearing prison attire and accompanied by a visibly-armed law enforcement officer, eviscerated the presumption of innocence to which Mr. Christenson was entitled. That depiction resulted (at least in part) from the failure of Mr. Christenson's trial counsel to object to, or request a curative instruction regarding, the admission of the videotape. (*See* A85-A86.)

This Court has held that requiring a defendant to appear before a jury under even *one* of the offending features present in Mr. Christenson's videotaped statement infringes the constitutional presumption of innocence. That the admission of a videotape with all *three* constitutional infirmities improperly undermined the presumption of innocence and prejudiced Mr. Christenson's defense, therefore, should be beyond serious dispute.

In *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976), the Court held that a state cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial dressed in identifiable prison clothes. The Court predicated its finding on "a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.* at 504-05. In *Illinois* v. *Allen*, 397 U.S. 337, 344 (1970), the Court likewise observed that a defendant's appearance before the jury in shackles "might have a significant effect on the jury's feelings about the defendant." *Id.* The Court also has recognized that the "sight of a security force within the courtroom might under certain conditions 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.'" *Holbrook* v. *Flynn*, 475 U.S. 560, 569 (1986) (quoting *Kennedy* v. *Cardwell*, 487 F.2d 101, 108 (6th Cir. 1973)).

The emblems of predetermined guilt portrayed in the videotape call into question the "fairness of the fact-finding process"

and require "close judicial scrutiny." *Holbrook*, 475 U.S. at 568 (citing *Estelle*, 425 U.S. at 503-04). Only an "essential state policy" could justify presenting the defendant in that light. *Id.* No such policy was present here.

The obvious significance of the evidence was augmented by the trial court's error in admitting the videotape without any curative instruction. In Mr. Christenson's case, his counsel failed to request, and the trial court failed to give, an instruction to the jurors that they should not consider Mr. Christenson's prison garb, shackles and armed escort to be an indicative of guilt, innocence or any other matter. As a result of counsel's failure, there was nothing to prevent the jury from perceiving Mr. Christenson as guilty, dangerous and untrustworthy, an image that destroyed the presumption of innocence to which Mr. Christenson was constitutionally entitled.

The destruction of Mr. Christenson's presumption of innocence prejudiced him in both the guilt/innocence and sentencing phases of trial. *See Elledge* v. *Dugger*, 823 F.2d 1439, 1450 (11th Cir. 1987), *op. withdrawn in part*, 833 F.2d 250 (1987) ("a jury might view the [capital defendant's wearing of] shackles as first-hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision"). The Court should vacate Mr. Christenson's conviction and instruct that the videotape may not be shown to a jury in any subsequent proceeding against Mr. Christenson.

III.

The Georgia Supreme Court Erred in Not Reversing Mr. Christenson's Conviction on the Ground that the Cumulative Impact of the Ineffectiveness of His Trial Counsel During all Phases of their Representation of Mr. Christenson Rendered Mr. Christenson's Conviction Unreliable and Abridged his Rights Under the Sixth and Fourteenth Amendments.

The adequacy of Mr. Christenson's representation, just as the fairness of Mr. Christenson's capital proceedings, should also be reviewed as a whole, rather than merely examined in isolation with respect to each "phase" of the trial. The Superior Court found, and the Georgia Supreme Court affirmed, that Mr. Christenson's trial counsel were deficient during all "phases" and aspects of Mr. Christenson's trial, from pre-trial preparation, through the trial as to guilt or innocence, and during the sentencing proceedings. The cumulative impact of that pervasive ineffectiveness deprived Mr. Christenson of his constitutional right to a fair trial. *See Lundy* v. *Campbell*, 888 F.2d 467, 472-73 (6th Cir. 1989); *Cooper* v. *Sowders*, 837 F.2d 284, 288 (6th Cir. 1988); *Walker* v. *Engle*, 703 F.2d 959, 968 (6th Cir.1983); *cf. Derdon* v. *McNeel*, 978 F.2d 1453, 1455-58 (5th Cir. 1992) (adopting the majority rule on cumulative error with certain limitations); *United States* v. *Rivera*, 900 F.2d 1462, 1477 (9th Cir. 1990) (concluding after a review of the record that there was no cumulative error such that defendant was denied his right to a fundamentally fair trial).

The cumulative effect of the errors by Mr. Christenson's trial counsel was so "prejudicial to [Mr. Christenson] that reversal is warranted." *United States* v. *Wallace*, 848 F.2d 1464, 1478 (9th Cir. 1988). As this Court has admonished, "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). The record here establishes that Mr. Christenson did not receive his constitutional right to a fair trial.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and reverse the decision of the Supreme Court of Georgia with respect to the questions presented herein.

Respectfully submitted,

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APPENDIX

In the Supreme Court of Georgia

Decided:

S97A1435. TURPIN, WARDEN v. CHRISTENSON.
S97X1438. CHRISTENSON v. TURPIN, WARDEN.

THOMPSON, Justice.

Scott Lynn Christenson was convicted of murder and armed robbery in 1990, and sentenced to death. This Court affirmed Christenson's convictions in *Christenson* v. *State*, 261 Ga. 80 (402 SE2d 41) (1991) ("*Christenson I*"), but remanded to the trial court to determine if the State had a good faith basis for some of its cross-examination questions during the sentencing phase and to conduct a *Jackson-Denno* hearing on the admissibility of a custodial statement introduced in the sentencing phase. The United States Supreme Court denied Christenson's petition for certiorari. *Christenson* v. *Georgia*, 502 U. S. 855 (112 SC 166, 116 LE2d 130) (1991). In *Christenson* v. *State*, 262 Ga. 638 (423 SE2d 252) (1992) ("*Christenson II*"), this Court affirmed Christenson's death sentence. Christenson's petition for certiorari was again denied. *Christenson* v. *Georgia*, 508 U. S. 927 (113 SC 2388, 124 LE2d 291) (1993).

In 1995 Christenson filed this habeas action, raising numerous claims, including ineffective assistance of counsel. The habeas court ruled that many of Christenson's claims were not subject to habeas review because they had been addressed on direct appeal, and that many other claims had been procedurally defaulted. The habeas court, however, vacated Christenson's death sentence because his trial counsel had been ineffective in the preparation for and the conduct of the sentencing phase. The State appeals the habeas court's vacation of the sentence, S97A1435, and Christenson cross-appeals the habeas court's affirmance of his conviction, S97X1438. We affirm.

The factual background for Christenson's conviction and sentence is set out in *Christenson I*, supra at (1). Briefly summarized, the evidence adduced at trial showed that the victim, Albert L. Oliver III, was last seen driving his Toyota sports utility

vehicle, with Christenson in the passenger's seat, on July 6, 1989. Christenson was arrested for stealing gas in Lonoke, Arkansas, on July 7, 1989. He was alone and driving Oliver's vehicle. There were bloodstains in the vehicle and on some of Christenson's clothes. After Oliver's body was discovered near Columbus, Georgia, Christenson admitted to killing Oliver in four separate statements: a written statement, two audiotaped statements, and a videotaped statement which included Christenson's reenactment of the crime. According to his statements, Christenson hitched a ride with Oliver (with whom he was acquainted), tried to take his vehicle at gunpoint, struggled with Oliver for the weapon, and shot Oliver and dumped his body in a rural area.

CLAIMS THAT ARE BARRED

1. Christenson raised numerous claims of alleged prosecutorial misconduct in his habeas petition regarding both the guilt/innocence and sentencing phases of his trial. He claimed the prosecutor made improper closing arguments, including comments regarding Christenson's lack of remorse, Christenson's failure to testify, prejudicial matters outside the record, the prosecutor's personal and religious beliefs, and the impact of the crime on the victim's family. In addition, Christenson claimed prosecutorial misconduct because the State questioned mitigation witnesses about Christenson's prior offenses without providing Christenson with pretrial notice of the intent to raise these offenses in the penalty phase.

The habeas court correctly ruled that these claims are barred. It is well settled that "[a]fter an appellate review the same issue[] will not be reviewed on habeas corpus." *Elrod* v. *Ault*, 231 Ga. 750, 750 (204 SE2d 176) (1974). Issues which were raised and decided on direct appeal cannot be reasserted in habeas corpus proceedings. *Gunter* v. *Hickman*, 256 Ga. 315 (1) (348 SE2d 644) (1986); *Gaither* v. *Gibby*, 267 Ga. 96 (2) (475 SE2d 603) (1996). This Court has already considered the existence of error in the State's closing arguments on direct appeal and ruled adversely to Christenson. *Christenson I*, supra at (7). In addition, the State's questions in the penalty phase regarding Christenson's prior offenses

were previously addressed by this Court and found to be proper. *Christenson II*, supra at (2). We find no error.

2. Christenson alleges that the trial court erred by refusing to charge the jury on voluntary manslaughter. This claim was addressed on direct appeal and this Court held that the evidence did not support a charge on voluntary manslaughter. *Christenson I*, supra at (6). Therefore, this habeas claim is barred. *Gunter*, supra; *Elrod*, supra.

3. Christenson claims that the trial court erred by failing to exclude questions about Christenson's prior offenses and to prevent improper comments by the State during closing argument. These habeas claims were also characterized by Christenson as prosecutorial misconduct in Division 1 and are barred for the same reason: they were litigated on direct appeal. Id.

4. Christenson alleges the trial court erred by denying him funds to retain a psychiatrist. This claim was considered on direct appeal and this Court ruled adversely to Christenson. *Christenson I*, supra at (1) (c). Therefore, this habeas claim is barred. *Gunter*, supra; *Elrod*, supra.

5. This Court previously held that Christenson's custodial statements were voluntary and admissible. *Christenson I*, supra at (3). The State also introduced a custodial statement made by Christenson, after a prior arrest for car theft, as evidence in aggravation. This Court remanded for a *Jackson-Denno* hearing on the admissibility of this statement, *Christenson I*, supra at (9), and later held that the statement was admissible. *Christenson II*, supra at (2). Since the admissibility of these statements was already addressed on direct appeal, a habeas claim on these grounds is barred. *Gunter*, supra; *Elrod*, supra.

6. Christenson's habeas complaints regarding the qualification of prospective jurors were addressed on direct appeal and, accordingly, are barred. *Christenson I*, supra at (4); id.

7. The failure of the trial court to conduct a *Batson* inquiry was addressed on direct appeal. *Christenson I*, supra at (5). Therefore, this claim is barred. *Gunter*, supra; *Elrod*, supra.

8. This Court has previously determined that Christenson's death sentence was not disproportionate to other death sentences. *Christenson II*, supra at (3).

CLAIMS THAT ARE PROCEDURALLY DEFAULTED

9. Christenson complains in his habeas corpus petition about several alleged instances of prosecutorial misconduct which were not addressed on direct appeal. Specifically, Christenson claims that the prosecutor should have recused himself due to prior dealings with Christenson, that he improperly commented on several matters outside the evidence, and that he mischaracterized the evidence during cross-examination. Christenson could have raised these issues on direct appeal but he failed to do so. In Georgia, the failure to raise an error timely generally waives a habeas claim unless the petitioner can meet the cause and prejudice test:

> [A] failure to make timely objection to *any* alleged error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus. However, an otherwise valid procedural bar will not preclude a habeas corpus court from considering alleged constitutional errors or deficiencies if there shall be a showing of adequate cause for failure to object or to pursue on appeal *and* a showing of actual prejudice to the accused.

Black v. *Hardin*, 255 Ga. 239 (4) (336 SE2d 754) (1985); see also OCGA § 9-14-48 (d). The only exception to the cause and prejudice test is the granting of habeas corpus relief to avoid a "miscarriage of justice," which is an extremely high standard that is not met in this case. See *Valenzuela* v. *Newsome*, 253 Ga. 793 (4) (325 SE2d 370) (1985) ("miscarriage of justice" approaches the situation where the State is imprisoning the wrong person due to mistaken identity).

Christenson's claims of prosecutorial misconduct are thus defaulted unless he can satisfy the cause and prejudice test. To show cause, Christenson must demonstrate that "some objective

factor external to the defense impeded counsel's efforts to raise the claim that has been procedurally defaulted." *Turpin* v. *Todd*, 268 Ga. 820, 825 (__ SE2d__) (1997); *McCleskey* v. *Zant*, 499 U.S. 467, 493 (111 SC 1454, 113 LE2d 517) (1991). Objective factors which may constitute "cause" include interference by government officials that makes compliance with the procedural rules impossible or a showing that a factual or legal claim was not available to counsel. *Turpin*, supra. Ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984), also constitutes "cause," but attorney error that falls short of that standard does not. Id. To show prejudice, Christenson must demonstrate actual prejudice that "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 828; *United States* v. *Frady*, 456 U. S. 152, 170 (102 SC 1584, 71 LE2d 816) (1982).

Christenson cannot show sufficient cause to excuse his procedural default. He presents no evidence that any external factors impeded his counsel's ability to raise any of these claims, and the factual and legal basis of these claims was available to him on direct appeal. Christenson resorts only to alleged ineffectiveness of counsel to support a showing of cause. Although Christenson's trial counsel was deficient in the preparation for and conduct of his trial,[1] Christenson received additional appellate counsel for his direct appeal[2] and he does not point to any errors or omissions by appellate counsel which might constitute ineffective assistance under *Strickland* v. *Washington*. Instead, he merely asserts that if this Court concludes that prosecutorial misconduct claims were not raised on direct appeal, then we must hold that Christenson's appellate counsel provided ineffective assistance sufficient to constitute cause. This is an incorrect statement of the law. "[T]he

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[1] The ineffective assistance of Christenson's *trial* counsel is addressed in Division 12.

[2] Christenson's trial counsel was supplemented on direct appeal by attorneys James A. Messner, Frederick Robinson, Stephen M. McNabb, Michael G. McGovern, Stephen B. Bright, Charlotta Norby and the law firm of Fulbright & Jaworski.

mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Murray* v. *Carrier*, 477 U. S. 478, 486 (106 SC 2639, 91 LE2d 397) (1986). Since there was no showing that Christenson's appellate counsel was ineffective, Christenson's prosecutorial misconduct claims which were not raised on direct appeal are procedurally defaulted.

10. Christenson also alleges numerous errors by the trial court that include: failing to grant a continuance at the start of the trial, refusing to grant funds to hire a defense investigator, improperly restricting voir dire, failing to require the State to comply with *Brady* v. *Maryland*, giving an erroneous jury charge, and failing to exclude prejudicial evidence, such as the reenactment videotape and photos of the victim's body. None of these claims were raised on direct appeal and, for the same reasons enumerated in Division 9 of this opinion, Christenson does not show sufficient cause to overcome his procedural default.[3]

11. Christenson asserts in his habeas appeal that the Georgia death penalty statutes, OCGA § 17-10-1, et. seq., and the Unified Appeal are unconstitutional. These claims could have been raised in Christenson's direct appeal but they were not. There is no showing of cause so these claims are procedurally defaulted. *Turpin*, supra at 825; *Black*, supra.

INEFFECTIVE ASSISTANCE OF COUNSEL

12. Christenson alleges that his trial counsel provided him with ineffective assistance of counsel during the preparation for and conduct of his trial. This claim is neither barred nor defaulted. Georgia law provides that an ineffective assistance of counsel claim need not be raised until such time as trial counsel no longer represents the defendant. *White* v. *Kelso*, 261 Ga. 32 (401 SE2d

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[3] The failure of Christenson's trial counsel to object to the alleged prosecutorial misconduct or trial court errors may constitute support for his separate claim of ineffective assistance of counsel, which is not procedurally defaulted and is addressed in Division 12.

733) (1991). The rationale behind this rule is that counsel cannot reasonably be expected to assert his or her own ineffectiveness. Id. Mr. Richard A. Bunn, one of Christenson's trial attorneys,[4] continued as Christenson's appellate counsel through the exhaustion of Christenson's direct appeals. See *Christenson II*, supra at 639; *Christenson I*, supra at 93. When Mr. Bunn ceased his representation, Christenson's habeas counsel raised the claim of ineffective assistance of counsel, satisfying the rule that this claim must be raised at the first possible post-conviction opportunity. *White*, supra. Ineffective assistance of counsel is therefore not barred or defaulted and remains a viable claim.

A claim of ineffective assistance of counsel is grounded in the general right to counsel guaranteed to criminal defendants by the Sixth Amendment to the United States Constitution and Article I, Section I of the Georgia Constitution. Appellate courts apply a two-pronged test to determine if counsel's performance was ineffective as to require reversal of a conviction or a death sentence:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

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[4] Christenson's other trial attorney was Mr. William L. Kirby II, who apparently ceased representing Christenson after the trial. References to "trial counsel," "Christenson's counsel," or "defense counsel" include both Mr. Bunn and Mr. Kirby.

Strickland v. *Washington*, supra at 687. The Georgia Supreme Court adopted the *Strickland* test in *Smith* v. *Francis*, 253 Ga. 782 (325 SE2d 362) (1985). For Christenson to show that his trial counsel's performance was defective, he must demonstrate that his trial counsel's performance was not reasonably effective in light of the circumstances confronting his counsel before and during the trial. *Smith*, supra at (1). Hindsight is not employed, and Christenson's counsel is afforded a strong presumption that their conduct fell within a wide range of reasonable professional conduct and that their significant decisions were made in the exercise of reasonable professional judgment. Id. In order to show prejudice, Christenson must demonstrate that "there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. Christenson must show both defective representation and prejudice in order to prevail on this claim.

(A) The Guilt/Innocence Phase

In July 1989, shortly after Christenson's arrest, the trial court appointed Mr. Richard A. Bunn and Mr. William L. Kirby II to represent the defendant. Trial counsel made a determination that, based on the evidence, there would likely be a conviction and that the crucial phase of the trial would be the penalty phase. Although Mr. Bunn had no experience trying a murder case, let alone a death penalty case, they decided that Mr. Kirby would be primarily responsible for the guilt/innocence phase and Mr. Bunn would be primarily responsible for the penalty phase. The trial took place in March 1990.

Trial counsel had approximately eight months from appointment until trial, but they conducted little preparation and investigation of Christenson's case until the eve of trial. In October 1989, trial counsel filed a number of motions relating to guilt/innocence issues, such as a motion to hire an investigator and a motion to suppress the defendant's statements. The trial court denied Christenson's motion for an investigator in February 1990 and it was only after this denial that Christenson's counsel traveled

to Arkansas to interview law enforcement witnesses to Christenson's arrest and initial statements. This investigatory trip took place less than two weeks before trial and *after* the *Jackson-Denno* hearing on the admissibility of Christenson's statements. Although trial counsel filed Christenson's motion to suppress defendant's statements in October 1989, they did nothing to obtain a hearing on this issue until February 1990. At that hearing, Christenson's counsel filed a motion to continue the hearing because they had not "had an opportunity to get to Arkansas" and interview witnesses in that state. The trial court, unimpressed with the reason, denied the motion for a continuance and conducted the hearing. Then, *at defense counsel's request,* the trial court delayed ruling on the statements' admissibility until the business day before the trial was to begin. At that final pretrial conference, the trial court ruled that the statements were admissible. Christenson's counsel then informed the trial court that they were not prepared to proceed to trial, and the trial court took this to be another motion for continuance, which it denied.

Mr. Kirby tried the guilt/innocence portion of the trial. In his opening statement, Mr. Kirby told the jury that the defense would show that Mr. Oliver, the victim, had been a drug-dealing homosexual who had initiated the events which led to his death by attempting to trade sex for drugs. As the trial progressed, it became apparent that trial counsel had virtually no evidence to support this characterization of the victim. The only "evidence" to support the defense theory that Oliver was a homosexual was some condoms found in his sports utility vehicle, some friends who were teenage males, and the fact that he was unmarried, 31 years old and lived alone.[5] There was absolutely no evidence to support the defense theory of a drug deal gone bad because no drugs or drug residue

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[5] In fact, the jury heard evidence to contradict this theory because one of the people who found Oliver's body was described as Oliver's former girlfriend. Also, Christenson's statements introduced at trial did not mention sex or drugs -- Christenson had consistently stated that he hitched a ride with Oliver so he could take his vehicle.

were found in Oliver's truck or apartment. Mr. Kirby nonetheless persisted with this theme on closing argument by laying out these tenuous "facts" and telling the jury to "come to what conclusions you may." The jury convicted Christenson of malice murder and armed robbery.

Pretermitting the question of defective representation in the guilt/innocence phase, we find the habeas court did not err by ruling that Christenson cannot meet the prejudice prong of *Strickland*. Although Christenson's counsel's preparation for and conduct of the guilt/innocence phase included errors and omissions, the evidence of Christenson's guilt was overwhelming. The jury heard, read and saw Christenson admit to killing Oliver in several separate statements, all later held to be admissible by this Court. *Christenson I*, supra at (3). Christenson was the last person seen with Oliver, and Christenson was arrested the following day driving Oliver's truck in another state. There was blood in the truck and on Christenson's clothes. Christenson cannot show that there was a reasonable probability that, but for trial counsel's errors, he would not have been convicted. See *Strickland*, supra; *Smith*, supra. We therefore affirm the habeas court's ruling on Christenson's convictions.[6] Because the evidence introduced in the guilt/innocence phase carries over into the penalty phase, some of trial counsel's deficiencies in the guilt/innocence phase will also be addressed in the penalty phase to the extent they prejudiced Christenson and rendered his sentence unreliable.

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[6] Christenson also claims that trial counsel was ineffective in failing to develop evidence to support a claim of voluntary manslaughter. This contention is without merit. The trial evidence and the available information showed that Christenson initiated an armed robbery by pointing a gun at the victim, without provocation, and then killed the victim when he resisted. A voluntary manslaughter charge is not warranted under these circumstances. See *Christenson I*, supra at (6); *Horton* v. *State*, 249 Ga. 871 (1) (295 SE2d 281) (1982); *Fields* v. *State*, 211 Ga. 335 (5) (85 SE2d 753) (1955).

(B) The Penalty Phase

Defense counsel, as previously mentioned, recognized that the penalty phase would be the crucial phase of the trial, considering the amount of evidence pointing to Christenson's guilt. Mr. Bunn, although he lacked any experience trying a death penalty case, was primarily responsible for assembling and presenting the mitigating evidence. Soon after appointment, trial counsel noticed that Christenson seemed aloof and detached; often they had to rely on his family, especially his father, to get him to communicate with them. Trial counsel filed a motion for psychiatric evaluation because they believed that Christenson needed some "expert help" and because they believed that mental health issues might be relevant at trial. Although trial counsel recognized that mental health might be a mitigating factor in the sentencing phase, Mr. Kirby was primarily involved with investigating and developing the mental health evidence. Trial counsel believed that this evidence would be more relevant to guilt/innocence issues, such as competency to stand trial or a verdict of guilty but mentally ill.

At the hearing on the motion for psychiatric evaluation, trial counsel presented some of Christenson's patient files from when he had been placed in the Bradley Center, a private psychiatric hospital, for in-patient treatment when he was 15 years old (three years before the murder).[7] Christenson had been ordered to undergo psychiatric treatment due to several property crimes he had committed as a juvenile. Trial counsel also presented the testimony of Christenson's father, who stated that his son had a drug problem and that he suffered from "mood changes." The trial court granted the motion in order to determine Christenson's ability to appreciate the nature of the charges against him and to assist in his defense.

Christenson has an extensive history of psychiatric problems and substance abuse. The Bradley Center files contained a diagnosis of dysthymic disorder, alcohol abuse, conduct disorder, and under-

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[7] Trial counsel testified at the habeas hearing that they were unsure where they obtained these files or who gave them the files.

socialized, non-aggressive, narcissistic personality disorder with features of sociopathy. The files also contained information on a genetic disposition toward alcohol abuse in the Christenson family and Christenson's own extensive alcohol abuse, depression, anger, frustration, lack of impulse control and "poor reality testing." The Bradley Center Psychological Report noted that Christenson's alcohol abuse sometimes led to blackouts, that Christenson had an underdeveloped "ability to utilize his abstractive and cognitive integrating skills," and that he had very weak "perceptual and organizational processes ... in terms of adequately discriminating and delineating the external reality." The Bradley Center gave Christenson a poor prognosis for recovery and recommended lengthy treatment, but Christenson's parents reached the limits of their insurance coverage after six weeks and removed Christenson from the Center.

Pursuant to the trial court's order, Christenson was evaluated by a state psychologist, Dr. Karen Bailey-Smith, who determined that Christenson was competent to stand trial and had been legally sane when he committed the crimes. In addition to her competency determination, Dr. Bailey-Smith diagnosed Christenson with a Personality Disorder Not Otherwise Specified and Psychoactive Substance Abuse Not Otherwise Specified. She further noted a dramatic 20 point decline in Christenson's IQ in the three years since his stay at the Bradley Center, from bright-normal to low-average intelligence, which she attributed to drug usage.

Despite the indications of Christenson's impaired mental condition, trial counsel did no further investigation of his mental health. Trial counsel never obtained the complete Bradley Center files nor did they read the entirety of the file portions that they did have. No one contacted the Bradley Center clinical staff. They also did not contact Dr. Bailey-Smith about her opinion on mitigation issues or consider using her report.[8] Trial counsel did file a motion for funds to hire a private psychiatrist and a second motion for psychiatric evaluation but they did not argue specific findings by the

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[8] Trial counsel admitted that they did not even look up Dr. Bailey-Smith's diagnosis in the DSM-III.

Bradley Center or Dr. Bailey-Smith, other than the decline in IQ. The trial court denied the motions.[9] After this denial, trial counsel did not seek any other means of obtaining expert assistance. They never sought the advice or resources of any criminal defense or capital defense organizations in Georgia, although they admitted at the habeas hearing that they were aware of these organizations. They did not contact any mental health professionals for reduced fee or pro bono support, or for referrals. They completely abandoned the mental health issue and did not use it at trial.

At the habeas corpus hearing, Christenson presented the testimony of two mental health experts. A psychiatrist testified that Christenson had an anxiety disorder characterized by a "pervasive sense of nervousness or anxiety [even] in a normal, non-threatening environment." He also stated that Christenson had an obsessive-compulsive disorder and an impulse-control disorder. According to the psychiatrist, Christenson was essentially non-confrontational (none of his prior offenses involved violence) and, due to his mental disorders, he would have been unable to make rational decisions during the struggle and shooting.

A licensed clinical social worker testified that Christenson's family has a history of alcoholism and mental illness. All four of Christenson's grandparents were alcoholics and his mother and paternal grandmother, like Christenson himself, had been institutionalized in mental hospitals. Christenson's mother suffered from depression; when Christenson was nine years old she had

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[9] Mr. Kirby testified that his primary purpose in requesting a psychiatric evaluation was not to determine Christenson's mental health, but as a "ploy" to "confuse the issues" and to ensure that Christenson was examined by a state psychiatrist in the Milledgeville facility. Mr. Kirby stated that these psychiatrists made poor witnesses for the State because they tended to have foreign accents and did not treat their patients very well.

locked herself in a car and threatened to shoot herself.[10] In addition, Christenson was largely estranged from and uncommunicative with his parents and their relationship had been strained for years. Although the social worker interviewed Christenson and some of his family members, much of her information regarding Christenson's childhood and troubled family history *came from portions of the Bradley Center files that trial counsel had apparently not reviewed.* Trial counsel instead chose to rely largely on Christenson's father, identified by the Bradley Center files as estranged from his son, for information on Christenson's childhood and family history and for assistance communicating with their client. Not surprisingly, trial counsel testified at the habeas hearing that they were unaware of the extent of Christenson's psychological problems and completely unaware of the prevalence of mental illness and substance abuse in Christenson's family.

In the penalty phase of the trial, the State introduced one witness in aggravation. The witness was Detective Cox of the Columbus Police Department. He testified that while he was transporting Christenson back to Columbus from Jackson, Tennessee, where Christenson had been arrested after stealing a truck in Georgia, Christenson had told him that "he was going to rob the individual and get the keys [to the truck] and that he would kill [the owner] if he didn't get the keys." This statement did not appear in the report that Detective Cox completed after he returned to Georgia with Christenson. One year later, and one day after Christenson was arrested for Oliver's murder, Detective Cox remembered that Christenson had made this statement. Detective Cox prepared a supplemental report and it was from this supplemental report that he testified about Christenson's statement. Trial counsel, though aware of the discrepancy between the two

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[10] According to affidavits and the psychiatrist's testimony, Christenson's mother was extremely overbearing and critical of her children. Most telling is her response to her son's arrest for the murder. She admitted that she "wanted Scott to be executed as soon as possible."

reports, failed to impeach Detective Cox with the first report that lacked a statement by Christenson. The statement that Christenson had previously intended to kill a truck owner during a vehicle theft was allowed in without challenge.

Trial counsel presented 19 witnesses and 27 exhibits as mitigation evidence in the penalty phase. The witnesses included Christenson's parents, grandfather, aunts, uncles, cousins and Little League baseball coaches. Trial counsel testified that their strategy was to "humanize" their client and prepared these witnesses by asking them to relate stories about "how Scott's childhood was a happy and normal childhood." The witnesses testified, most very briefly, that Christenson had been a good child until his beloved grandmother died when Christenson was 14 years old. Then, Christenson became withdrawn, his grades dropped and he began to get into trouble due to drugs. The mitigation exhibits were mainly baseball trophies and family photographs. A key defense exhibit directly contradicted the family witnesses: Christenson's school records clearly showed that Christenson's grades began to plunge two years before the death of his grandmother.

The mitigation witnesses were poorly prepared for their testimony. Billing records and trial counsel's habeas testimony indicate that trial counsel did not begin contacting most mitigation witnesses until the week before trial. Some mitigation witnesses were not contacted about their expected testimony until they were telephoned by trial counsel the night before they were to testify. As a result, the mitigation witnesses were not adequately prepared for the DA's cross-examination. The DA, in a series of questions testing the witness' knowledge of the defendant's reputation and character, asked the witnesses repeatedly about almost two dozen specific property offenses that Christenson had committed, most from when he was a juvenile. The witnesses were forced to admit they had heard that Christenson had been in some trouble but they did not know about his extensive juvenile and criminal record.[11]

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[11] Christenson was 18 years old when he was arrested for Oliver's murder. As a result, most of his prior offenses were

(continued...)

The Little League baseball coaches, in fact, admitted they had had almost no contact with Christenson since he was an adolescent. At the habeas hearing, trial counsel also admitted they were not aware of the extent of Christenson's juvenile record. Even though they knew Christenson had been in trouble with the law as a juvenile, they did not seek to obtain a copy of his juvenile record under the mistaken belief that specific juvenile offenses could not be referred to on cross-examination (trial counsel did no research on this point). See *Burrell* v. *State*, 258 Ga. 841, 844 (7) (376 SE2d 184) (1989). Some mitigation witnesses were also forced to admit that, based on their direct testimony of Christenson's happy childhood and supportive family, Christenson had been given many opportunities in life but had decided to squander them.

The DA repeatedly hammered home this theme in his closing argument: Christenson, despite being blessed with caring parents and every advantage, had wasted his opportunities and become a career criminal and a drug addict. The prosecutor also argued that the last of Christenson's five shots into Oliver had been the fatal shot,[12] giving Christenson the ability to stop short of killing the victim. Trial counsel did not object although this argument was plainly unsupported by the autopsy report and the medical examiner, who testified there was no accurate way to determine the order of the shots. The DA also argued the defendant's lack of remorse, that he had sat there "fish-eyed" during the trial. The Bradley Center files contained an explanation for Christenson's unresponsive demeanor (due to his mental disorders he would simply withdraw in stressful situations) but the jury of course heard nothing about Christenson's psychological background. Lastly, the DA reminded

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[11] (...continued)
juvenile offenses. The prior offenses were mostly burglaries and thefts (including auto theft).

[12] Oliver had been shot five times -- four wounds were minor wounds to his extremities and the fifth, fatal wound was to his back.

the jury that Christenson's main trial defense had been a vicious, wholly unsupported attack on the dead victim's character.

Mr. Bunn argued for the defense. He started by telling the jury that he had to renege on a promise made to the jury during Mr. Kirby's opening statement, that the defense would be able to explain why "two sad and aggrieved families" had been brought into the courtroom for this trial. He then proceeded to tell the jury, on three separate occasions, that he had *no* explanation for Christenson's actions:

> We don't know what went wrong with Scott. We don't know what happened to Scott along the way....
>
> We don't know what happened to Scott after the age of 14. When I look at Scott Christenson, I wonder just like everyone else what happened. I don't know what happened....
>
> I can't tell you how a boy with his potential ended up in this courtroom convicted of murder and armed robbery. When I look at his life, I can't explain it.

Mr. Bunn stated that Christenson had "no excuses" for what he had done. He told the jury "I'm not telling you that Scott deserves mercy" and asked for mercy only for Christenson's family. The jury returned a recommendation of death.

Although trial counsel is afforded tremendous deference over matters of trial strategy, the decision to select a trial strategy must be reasonably supported and within the wide range of professionally competent assistance. See *Devier* v. *Zant*, 3 F3d 1445, 1453 (11th Cir. 1993); *Strickland*, supra at 690. Trial counsel testified that they chose to "humanize" their client because Christenson's drug usage and "narcissistic" personality would not go over well in Harris County. However, before selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing. See *Jefferson* v. *Zant*,

263 Ga. 316, 319-20 (431 SE2d 110) (1993); *Baxter* v. *Thomas*, 45 F3d 1501, 1513 (11th Cir. 1995); *Bush* v. *Singletary*, 988 F2d 1082, 1091 (11th Cir. 1993) ("After an adequate investigation, counsel may reasonably decide not to present mitigating character evidence at sentencing"). An attorney is not ineffective because he fails to follow every evidentiary lead, but an attorney's strategic decision is not reasonable "'when the attorney has failed to investigate his options and make a reasonable choice between them.'" *Baxter*, supra, quoting *Horton* v. *Zant*, 941 F2d 1449, 1462 (11th Cir. 1991). The failure to conduct a reasonable investigation may render counsel's assistance ineffective. *Baxter*, supra at 1514; *Curry* v. *Zant*, 258 Ga. 527, 530 (371 SE2d 647) (1988) (counsel ineffective for failing to further investigate client's mental health despite indications that client was mentally ill).

Christenson's counsel possessed a wealth of information regarding Christenson's psychiatric problems and drug abuse, which they essentially ignored. This is not a situation where trial counsel was unaware of their client's psychiatric problems before trial. See *Williams* v. *State*, 258 Ga. 281 (7) (368 SE2d 742) (1988). From the beginning, Christenson's counsel had difficulty communicating with their client because he was aloof and detached. They knew their client had been institutionalized in a mental health facility when he was 15 years old, but they never fully reviewed the Bradley Center files which they possessed, nor did they attempt to determine if there were more files at the Bradley Center. In fact, they never tried to contact any of the Bradley Center staff. Trial counsel also failed to follow up on Dr. Bailey-Smith's report as mitigation evidence even though the report indicated a personality disorder, a substance abuse problem, and a dramatic decline in IQ. They further admitted that their attempt to obtain a second psychiatric examination was a "ploy" and not a serious attempt to determine Christenson's mental health. They did not understand the mental health material that they did review and took no steps to further their understanding. Although trial counsel acknowledged they believed that the penalty phase would be the crucial phase of the trial, they failed to investigate adequately Christenson's possible defenses to a death sentence. The decision to forego a line of

defense, without a substantial investigation, must be reasonable under the circumstances. *Jefferson*, supra at 320. Trial counsel's abandonment of the mental health mitigation issues, after only a cursory investigation of their client's psychological health, was not reasonable under the circumstances. A more complete investigation would have only entailed a more careful reading of the materials already in their possession and a few phone calls.

The decision not to investigate further into Christenson's mental health and background was also not strategic. See *Baxter*, supra (there are many-situations where an attorney may make a strategic decision not to pursue a line of investigation). Trial counsel ceased any investigation of Christenson's mental health after the trial court denied their second request for a psychiatric examination. It is apparent from the record that this failure to proceed may have stemmed in part from the division of labor. When Mr. Kirby, who was responsible for the guilt/innocence phase *and* the investigation of Christenson's mental health, was unable to develop Christenson's incompetency or insanity, he stopped his psychological investigation. Mr. Bunn, who was responsible for the penalty phase and mitigation evidence, failed to pick up where Mr. Kirby left off. Both of Christenson's lawyers admitted at the habeas corpus hearing that they were unaware of the extent of Christenson's mental problems, of specific episodes from his childhood, of his estrangement from his parents, and of his family's history of mental illness and substance abuse, although this information was in their possession or readily available. Mr. Bunn further conceded that, had he known of some of this information, he may have put it in front of the jury. Trial counsel was deficient in their investigation of available mitigation evidence. *Baxter*, supra; *Curry*, supra.

In addition, trial counsel's mitigation defense, to "humanize" their client, was inadequately presented and appears to have been cobbled together at the last minute. Trial counsel did not contact some mitigation witnesses until the trial had already begun. Witnesses were put on the stand who had only limited contact with Christenson in the several years before the crime. Witnesses were unprepared for the State's cross-examination about Christenson's

prior offenses and had to admit that they did not know the extent of his criminal record. Witnesses, after having testified (at trial counsel's urging) about how Christenson was a good but troubled kid with a supportive family, were forced on cross-examination to validate the State's theme that Christenson had deliberately squandered his opportunities in order to become a criminal. In addition, a key defense exhibit contradicted the testimony of the family witnesses about when and why Christenson began to have trouble as an adolescent. Mr. Bunn could draw no support in his closing argument from the mitigation evidence that trial counsel had presented; he admitted that the defense had no explanation for why Christenson had committed the crimes or why he should be spared, other than to show his family mercy.

Trial counsel committed a number of serious errors that hurt their case for a sentence less than death. First, trial counsel's argument in the guilt/innocence phase that the victim was a drug-dealing homosexual, without any evidence to support this assertion, could only have prejudiced the jury against their client. See *Young* v. *Zant*, 677 F2d 792, 798 (11th Cir. 1982) (competent counsel would not have gone to trial on an insanity defense without any evidence to support it). Second, Christenson's counsel did not attempt to impeach Detective Cox, the sole witness in aggravation, about his sudden remembrance, after a year had passed, of Christenson's comment to him after an arrest, even though trial counsel had Cox's original report and the report did not indicate any remarks by Christenson. Christenson's alleged comment that he had planned to kill a truck owner during a theft came in unchallenged. Third, defense counsel failed to object to the State's characterization of the order of the shots that killed the victim, even though these comments were unsupported by the trial evidence. The State was thus permitted to argue, without objection, that Christenson had inflicted four non-lethal wounds before deciding to fire the fatal shot. Lastly, in the closing argument, trial counsel specifically declined to ask for mercy for their client and implied that their client did not deserve mercy.

The habeas court determined that trial counsel was deficient in the preparation for and conduct of the sentencing phase due to

inadequate investigation of possible mitigation evidence and inadequate presentation of the mitigation case. *Baxter*, supra; *Curry*, supra. It further determined that Christenson was actually prejudiced by his trial counsel's errors. Id. The psychiatric evidence, if properly investigated and presented, could have totally changed the evidentiary picture. See *Baxter*, supra at 1515; *Stephens* v. *Kemp*, 846 F2d 642, 653 (11th Cir. 1988) ("prejudice is clear" where attorney failed to investigate adequately client's mental health and present evidence of client's mental problems in sentencing phase); *Zant* v. *Pitts*, 263 Ga. 529, 529 (436 SE2d 4) (1993) (trial counsel ineffective for failing to present a defense of mental retardation where mental examinations showed that defendant was mildly mentally retarded). Psychiatric evidence may have provided the jury with an explanation for Christenson's actions; trial counsel admitted to the jury that the mitigation evidence which they had presented provided no explanation for the crime. In addition, the jury found only one statutory aggravating factor, that the murder was committed during the course of an armed robbery. There was no torture and the shooting was not execution-style. In fact, the evidence at trial showed that Christenson had not planned to kill the victim during the robbery but had shot the victim during a struggle over the gun.

The evidence supports the habeas court's conclusion that, but for trial counsel's deficient representation, there exists a reasonable probability that the jury would have recommended life imprisonment. See *Strickland*, supra at 695; *Smith*, supra. That conclusion will not be disturbed on appeal. *Williams* v. *Caldwell*, 229 Ga. 453 (1) (192 SE2d 378) (1972). Therefore, we affirm the trial court's vacation of the death sentence due to ineffective assistance of counsel.

Judgments affirmed. All the Justices concur, except Hunstein and Carley, JJ., who dissent to the judgment in Case No. S97A1435.

S97A1435. TURPIN, WARDEN v. CHRISTENSON.
S97X1438. CHRISTENSON v. TURPIN, WARDEN.

CARLEY, *Justice, concurring in part and dissenting in part.*

I concur in Case Number S97X1438, wherein the majority affirms the denial of habeas relief as to Christenson's convictions for murder and armed robbery. However, I believe that the habeas court erred in vacating Christenson's death sentence for the murder. Therefore, I dissent to the majority's affirmance of the judgment in Case Number S97A1435.

I respectfully submit that both the habeas court's order and the majority's opinion support only the hypothetical proposition that Christenson's trial counsel could have presented a more effective defense to the imposition of the death penalty. However, the issue to be determined is whether the defense which actually was presented was ineffective. In the seminal case on ineffective assistance of trial counsel, the Supreme Court of the United States cautioned that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland* v. *Washington*, 466 U.S. 668, 689 (III) (A) (104 SC 2052, 80 LE2d 674) (1984). Christenson's defense is not rendered constitutionally ineffective simply because there is a possibility that it might have been more effective than it actually proved to be. "[T]he proper standard for attorney performance is that of reasonably effective assistance. [Cit.]" *Strickland* v. *Washington*, supra at 687 (III) (A).

No presumption of ineffectiveness attaches because the jury imposed the death sentence for the murder which Christenson committed. Indeed, there is a strong presumption that Christenson received effective representation. *Strickland* v. *Washington*, supra at 689 (III) (A); *Lowe* v. *State*, 267 Ga. 410, 415 (5) (d) (478 SE2d 762) (1996). Christenson's trial counsel is entitled to a presumption of effectiveness, and deference must be given to the tactics he determined to employ. *Strickland* v. *Washington*, supra at 689 (III) (A) ; *Lakes* v. *State*, 266 Ga. 389 (2) (467 SE2d 566) (1996). Christenson has no constitutional right to counsel who would insure

the return of a life sentence. He has only the right to "'"counsel reasonably likely to render and rendering reasonably effective assistance." (Cit.)' [Cit.]" *McGill* v. *State*, 263 Ga. 81, 82 (2) (428 *SE2d 341) (1993).* The appropriate test for determining whether Christenson was afforded his constitutional right to reasonably effective counsel

> has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial . . . we are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately. [Cit.]

Jefferson v. *Zant*, 263 Ga. 316, 318 (3) (a) (431 SE2d 110) (1993) The purpose of the effective assistance of counsel guarantee of the Sixth Amendment "is simply to ensure that criminal defendants receive a fair trial." *Strickland* v. *Washington*, supra at 689 (III) (A).

With the benefit of hindsight, the habeas court and the majority have engaged in what I perceive to be a second-guessing of the trial tactics of Christenson's trial counsel by making judgments as to what should have been done additionally or differently. However, hindsight is wholly irrelevant in judging the effectiveness of trial counsel. *Strickland* v. *Washington*, supra at 689 (III) (A) ; *Smith* v. *Francis*, 253 Ga. 782, 783 (1) (325 SE2d 362) (1985). Employment of hindsight

> usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. . . . "[I]n retrospect, one may always

> identify shortcomings," [cit.] but perfection is not the standard of effective assistance.

Waters v. *Thomas*, 46 F3d 1506, 1514 (II) (A) (3) (11th Cir. 1995) "The reasonableness of the conduct is viewed at the time of trial and under the circumstances of the case. [Cits.]" *Berry* v. *State*, 267 Ga. 476, 479 (4) (480 SE2d 32) (1997).

The primary conclusion is that Christenson's trial counsel was constitutionally ineffective for failing to pursue the mental health issue as a possible additional mitigating factor. However, it is clear that trial counsel made the strategic decision that pursuing the mental health issue would be less effective with the local jurors than an attempt at "humanizing" Christenson. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, supra at 691 (III) (A). It is not constitutionally ineffective to fail to pursue an issue which, in the estimation of otherwise reasonable trial counsel, would not be an effective trial strategy.

> Sometimes, a lawyer can make a reasonable decision that no matter what an investigation might produce, he wants to steer clear of a certain course. In this case, counsel were longtime local lawyers who knew their community.

Rogers v. *Zant*, 13 F3d 384, 387 (11th Cir. 1994). Certainly, Christenson's trial attorneys were in a better position than either the habeas court or this Court to determine whether the local jurors would be more inclined to accept a strictly "humanizing" mitigation strategy than one which was also based upon expert testimony as to Christenson's voluntary drug use and his "narcissistic" personality. In some communities, voluntary drug use and psychological problems might not be considered as circumstances in mitigation of a murder wherein the victim was shot five times, the body was concealed and the perpetrator then fled the state in the victim's stolen truck. Since trial counsel believed that the local jury would

not readily accept a defense based in whole or part upon Christenson's voluntary drug use and his psychological problems, it could be argued that it would have been an act of ineffective legal representation had Counsel nevertheless asserted that defense.

> [S]tacking different defenses can undercut with the jury the defense team's credibility, which is essential to a likelihood of success. [Cits.] . . . [G]ood advocacy requires the winnowing out of some arguments in favor of stressing others: multiplicity of arguments or defenses hints at the lack of confidence in any one. [Cit.]

Rogers v. *Zant*, supra at 388. Accordingly, Christenson's death sentence is being reversed for the anomalous reason that his trial counsel failed to pursue a trial tactic which, had they elected to follow it, could be urged in post-conviction proceedings as an example of their ineffectiveness.

The habeas court and the majority purport to find other instances of ineffectiveness on the part of Christenson's trial counsel. I submit that all of these instances evidence the unauthorized second-guessing of trial counsel's tactical decisions and the application of an erroneous presumption that those tactical decisions were ineffective merely because they were unsuccessful. The fundamental error in the habeas court's order which the majority perpetuates is in this failure "to eliminate the distorting effects of hindsight. . . ." *Strickland* v. *Washington*, supra at 689 (III) (A). The law of this state authorizes the imposition of the death penalty for the crime of murder and there are some murder cases in which that penalty is authorized "[e]ven if many reasonable lawyers would not have done as defense counsel did at trial. . . ." *Rogers* v. *Zant*, supra at 386. In my opinion, this is one of those cases. Therefore, I respectfully dissent.

I am authorized to state that Justice Hunstein joins in this opinion.

SUPREME COURT OF GEORGIA

Case No. S97X1438 Atlanta, April 01, 1998

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

SCOTT LYNN CHRISTENSON v. TONY TURPIN, Warden

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

SUPREME COURT OF GEORGIA

Case No. S97A1435 Atlanta, April 01, 1998

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

TONY TURPIN, Warden v. SCOTT LYNN CHRISTENSON

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein and Carley, JJ., dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

SCOTT LYNN CHRISTENSON,	*	
Petitioner,	*	
V.	*	CIVIL ACTION NO. 95-V-562
TONY TURPIN, Warden, Georgia Diagnostic and Classification Prison,	*	(HABEAS CORPUS)
Respondent.	*	

ORDER

COMES NOW before the court the Petitioner's Amended Petition for Writ of Habeas Corpus as to his conviction and sentence in the Superior Court of Harris County on criminal action number 89-CR-7525. Having considered the Petitioner's Amended Petition for Writ of Habeas Corpus (the "Amended Petition"), the Respondent's Amended Answer, relevant portions of the trial record, evidence admitted at the hearing on the merits, and the arguments of counsel, the court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 (1993) and grants the petition for writ of habeas corpus as to the sentence of death and vacates the sentence of death.

PROCEDURAL HISTORY

1. In 1990, Scott Lynn Christenson was convicted of murder and armed robbery by a jury in the Superior Court of Harris County, Hamilton, Georgia, and was sentenced to death. On direct appeal, the Supreme Court affirmed the guilty verdict and remanded to the trial court as to the death sentence for a hearing on two penalty-phase issues: whether the district attorney had a good faith basis for certain questions concerning prior offenses and whether Christenson's confession to an extrinsic crime was voluntary and admissible. *Christenson* v. *State*, 261 Ga. 80 (1991) ("*Christenson I*"). On remand, the trial court found that the district attorney's questions were proper and that Christenson's confession was

properly admitted. The Supreme Court then affirmed the sentence in 1992. *Christenson* v. *State*, 262 Ga. 638 (1992) ("*Christenson II*"). Christenson filed a petition for writ of habeas corpus in 1995; assisted by volunteer counsel, he filed an amended petition on May 3, 1996. The court conducted a hearing on the merits in this action on June 4, 5, 6 and 18, 1996. Christenson presented substantial evidence, including the testimony of three expert witnesses in the mental health field (one by deposition) and one expert in the field of firearms and ballistics, the affidavits and depositions of more than fifty fact and opinion witnesses, as well as the entire trial record and numerous additional exhibits.[13] The respondent presented the testimony of Christenson's two trial attorneys (at the hearing) and of one of his attorneys on the direct appeal (by deposition) and introduced several exhibits.[14]

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[13] Citations to the official transcript of the hearing conducted by the court in this action on June 4, 5, 6, and 18, 1996 (the "Hearing") refer to the transcript page, in the form **(Tr. [page number].)**. Exhibits introduced during the Hearing are cited as **(Px (or Rx) [exhibit number].)**. Citations to the official transcripts of proceedings conducted by the trial court prior to or during Christenson's criminal trial or proceedings on remand refer to the date of the hearing, in the form **(MM/DD/YY Tr. [page number).)**. Exhibits introduced during those proceedings are cited as **(State's (or Defendant's) Exhibit [exhibit number].)**. Documents included in the record from Christenson's trial and appeals are cited by their caption or title and by the date on which they were filed, entered, etc.

[14] Christenson sought to have Michael C. Garrett, Esq., a criminal defense lawyer from Augusta, Georgia testify as an expert on the defense of capital cases. (Tr. 225.) Following Respondent's objection to the testimony of Mr. Garrett, the Court ruled that Mr. Garrett's testimony would be inadmissible but permitted Petitioner to include Mr. Garrett's testimony, in affidavit form, as an offer of proof and to incorporate the offer of proof into the record. (Tr. 225-26.) Upon further consideration of the legal

(continued...)

CLAIMS FOR RELIEF

2. Christenson asserted in his Amended Petition the following general grounds for issuance of the writ of habeas corpus: denial of his right to the effective assistance of counsel at the pretrial, jury selection, guilt/innocence, and sentencing phases of the trial and on appeal; prosecutorial misconduct at trial, including failure to recuse and improper arguments and comments during the guilt/innocence and penalty phases; and trial court errors, including errors in evidentiary rulings, failure to grant a continuance, failure to provide funds for a psychiatrist and an investigator, errors in jury instruction, and improper exclusion of jurors. Christenson also asserted that the imposition of the death penalty was disproportionate and unwarranted in his case and that the Unified Appeal Procedure and the Georgia Capital Sentencing Statute are unconstitutional.

FINDINGS OF FACT

3. In July 1989, Christenson was arrested and charged with the murder of Albert L. Oliver III and armed robbery in connection with the theft of Oliver's truck. *See Christenson I*, 261 Ga. 80, n.1 (1991). Oliver, a Columbus, Georgia resident, and his truck disappeared and were reported missing, having been last seen on Thursday, July 6, 1989 at about 6:00 p.m. (3/21/96 Tr. 102-03.) Christenson, also a Columbus resident, was likewise last seen on Thursday, July 6 and was reported missing the following day. (3/23/96 Tr. 231-33, 239.) Near midnight on Friday, July 7, Christenson was arrested in Lonoke, Arkansas for stealing gasoline.

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[14] (...continued)
authorities cited by Respondent, including *Hammond* v. *State*, 264 Ga. 879, U.S. *cert. denied*, (1995), and *Jefferson* v. *Zant*, 263 Ga. 316, U.S. *cert. denied*, (1993), the court finds, as it did at the hearing, that Mr. Garrett's opinion testimony as to the standard for minimally acceptable performance in a capital case by appointed counsel in small communities in Georgia, is not admissible, and the court has not considered his testimony in the preparation of this Order.

By Saturday, July 8, 1989, Lonoke authorities learned that Christenson had been driving Oliver's truck and that Oliver had been reported missing. The following day, Sunday, July 9, Oliver's body was discovered in a secluded area near a highway in Harris County, Georgia, dead and bearing gunshot wounds. (3/21/96 Tr. 158, 3/22/90 Tr. 372-81; *see* Px. 59, p. 1 (autopsy report).)

4. Confronted by law enforcement officers with the fact that Oliver's body had been discovered, Christenson (who had earlier given statements denying knowledge of Oliver's whereabouts) gave incriminating statements regarding the death, including, among others, an oral statement reduced to writing which he signed, an audiotaped statement and a videotaped statement filmed near the site where Oliver's body had been found a short time after Christenson's extradition to Georgia. In several separate statements, Christenson admitted to shooting Oliver in the course of a struggle which ensued after Christenson attempted to take Oliver's truck at gunpoint. In those statements, Christenson described the struggle generally as follows: Christenson drew the gun and pointed it at Oliver; Christenson and Oliver struggled for control of the gun; the two fell together out of the truck, causing the gun to discharge, apparently hitting Oliver in the thigh, and then to fall to the ground; and Christenson grabbed the gun and fired additional shots at Oliver. Three statements to this effect were ultimately introduced into evidence at trial. See ¶ 12.

5. On July 21, 1989, the court appointed counsel to represent Christenson because he was indigent. (*See* Order Appointing Attorney For Indigent Person In Capital Case, July 21, 1989.) At the time of his appointment, the attorney, Richard A. Bunn, a sole practitioner in Hamilton, Georgia, had approximately ten years' experience practicing law. He testified that about thirty to forty percent of his work was in criminal law, and he estimated that he had tried fifteen to twenty felony trials to completion. He had never before been involved in the trial of a capital murder case. (Tr. 233-34, 680.) Soon after his appointment, Bunn asked the Court to appoint William L. Kirby II to assist in defending Christenson because, Bunn believed, the preparation of Christenson's defense "was [not] something that one attorney could

do by himself." (Tr. 362.)[15] Kirby, who had practiced primarily in the urban area of Columbus, Georgia, had more extensive criminal trial experience and had represented several defendants in capital murder cases although none had gone further than jury selection. (Tr. 729-30.) Defense counsel agreed that Kirby would be primarily responsible for the guilt/innocence phase of the trial and Bunn would be primarily responsible for the penalty phase. (Tr. 243, 278.) Trial counsel believed that there would likely be a conviction, anticipated that there would be a penalty phase, and understood that it would be important to put on the best possible mitigation case. (Tr. 828-30.) At the hearing, Kirby observed that Bunn was a mild person and that the district attorney was "a very powerful personality" and concluded that he believed that he himself could "have perhaps dealt with [the prosecutor] a little better than Mr. Bunn did" and probably should have handled the penalty phase. (Tr. 826-27.)

6. Christenson's trial was subject to the Unified Appeal Procedure (O.C.G.A. § 17-10-36), and Superior Court Judge William J. Smith reviewed the contents of the capital trial checklist with counsel at various stages of the case, as required. (12/8/89 Tr. 9-19; 1/4/90 Tr. 74-86; 2/14/90 Tr. 187-200; 3/23/90 Tr. 157-165.) Trial counsel filed a number of pretrial motions, including the following:

- Motion for Psychiatric Evaluation [of Christenson] (filed August 2, 1989, granted 1/4/90 Tr. 23, Order for Psychiatric Examination, filed on January 10, 1990)
- Motions for Funds with which to Hire Private Psychiatrist (filed October 19, 1989, denied 2/14/90 Tr. 144)
- Motion for Funds to Hire an Investigator to Aid in the Preparation and Presentation of His Defense (filed October 18, 1989, denied 1/4/90 *(In Camera* Hearing) Tr. 11-12)

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[15] For purposes of this Order, Messrs. Kirby and Bunn are referred to as "defense counsel" or "trial counsel."

- Motion to Suppress Defendant's Statements (filed October 18, 1989, denied 3/16/90 Tr. 63)
- Motion to Prohibit Psychologist Testimony (filed February 2, 1990, denied 2/14/90 Tr. 175)
- Second Motion for Psychiatric Examination (filed February 2, 1990, denied 2/14/90 Tr. 144)
- Renewed Motion for Funds with which to Hire Private Psychiatrist (filed February 2, 1990, denied 2/14/90 Tr. 144)
- (Second) Motion for Funds to Hire an Investigator to Aid in the Preparation of His Defense (filed February 2, 1990, denied 2/14/90 Tr. 178)
- Motion for Adequate Compensation of Counsel (filed February 2, 1990, Order for Payment of Appointed Counsel in Capital Case, filed April 5, 1990)
- Motion to Continue Hearings [on Jackson-Denno issues] (filed February 14, 1990, denied 2/14/90 Tr. 19)
- Motion to Reconsider Defendant's Motions to Dismiss and to Grant a Psychiatric Evaluation (filed March 14, 1990, denied 3/16/90 Tr. 12)

7. Within two weeks of Bunn's appointment, defense counsel filed a Motion for Psychiatric Evaluation because they believed that Christenson had mental problems which they "weren't qualified to deal with" and they needed "some expert help," both because Christenson was not being helpful to his attorneys and because his mental health status would be a significant issue in the case, including the sentencing phase. (Tr. 273-74, 441-44.) Five months passed before the court heard the Motion for Psychiatric Evaluation. At the hearing on January 4, 1990, trial counsel introduced five excerpts from the hospitalization record of Christenson's six-week commitment at the Bradley Center, a private psychiatric facility, in 1986 (three years before the death of Oliver). Christenson was placed in the Bradley Center, a private psychiatric hospital in Columbus, Georgia, for in-patient treatment as a form of probationary sentence after committing several property crimes

when he was 15 years old. (1/4/90 Tr. 11-13; 3/23/90 Tr. 227.). The Patient Discharge Summary contained a diagnosis of "[d]ysthymic disorder, alcohol abuse, conduct disorder, [under] socialized, non-aggressive" and "[n]arcissistic personality disorder with features of sociopathy" and gave a poor prognosis. The Summary discussed a genetic disposition toward alcoholism in the family and Christenson's own significant alcohol abuse with black-outs as well as his "general denial" and "poor reality testing," depression, anger, frustration, and lack of impulse control. (1/4/90 Tr., Defendant's Exhibit 2 at 2.) The Psychological Report noted Christenson's "constant continuous alcohol abuse," eventually to the point of black outs, for at least the previous year, an underdeveloped "ability to utilize his abstractive and cognitive integrating skills," and very weak "perceptual and organizational processes . . . in terms of adequately discriminating and delineating the external reality." (1/4/90 Tr., Defendant's Exhibit 4 at 1.)

At the hearing on the Motion for Psychiatric Evaluation, defense counsel also presented the testimony of Christenson's father, Terry, who testified briefly that he believed that Christenson had a drug problem and suffered from "mood changes." (1/4/90 Tr. 10-11, 17.) Kirby also declared that he had observed that his client had some memory loss and therefore had some difficulty in assisting counsel. (1/4/90 Tr. 17-19.) The prosecutor commented that the evidence had not met the threshold of showing a psychiatric issue, but did not oppose the motion for an evaluation "because of the nature of the case and because of the scrutiny that these cases undergo in the future." (1/4/90 Tr. 20-21.) The court granted the motion and ordered that Christenson be evaluated by a psychiatrist as to "his ability to appreciate the nature and severity of the charges presently pending against him; his ability to understand and knowingly and intelligently decide to advance or waive all issues involved; and his ability to assist his attorney in preparing and conducting his defense." (Order for Psychiatric Examination, January 10, 1990, at 1.)

8. Christenson was evaluated by a state clinical psychologist (not a psychiatrist), Karen Bailey-Smith, Ph.D., who found that Christenson was competent to stand trial and had been legally sane

at the time of the crime and diagnosed him as having Personality Disorder NOS (Not Otherwise Specified) and Psychoactive Substance Abuse NOS. (Px. 60 at 2.) Dr. Bailey-Smith's report to the court noted a dramatic decrease in Christenson's intellectual assessment, approximately twenty points from the "bright-normal" range when tested at the Bradley Center to the "low average" range three years later, which she opined was "likely to be related to his drug usage." Defense counsel failed to meet with their client prior to the evaluation, so as to reduce the chance that the evaluation would be harmful to the defense. For example, counsel did not advise Christenson that he would be asked to waive his privilege against self-incrimination or of the consequences of such a waiver, (Tr. 461 (Bunn); Tr. 909-10 (Kirby)), even though they knew that he would be asked to do so. At the request of the prosecutor, Dr. Bailey-Smith included in her report an addendum describing the shooting as Christenson related it to her during the interview. The account of the events Christenson gave at that point differed significantly from the three statements he gave to Georgia Bureau of Investigation agents and other law enforcement officers near the time of his arrest which were ultimately introduced at trial, e.g., according to Bailey-Smith's report, Christenson stated that he and Oliver had arranged to meet for a drug deal and that he brought two of his father's guns to use in trade for drugs. (Px. 60, Addendum, pp. 1-2.) Soon after Christenson's evaluation by the state psychologist, defense counsel filed a Motion to Prohibit Psychologist Testimony and Second Motion for a Psychiatric Examination on February 2, 1990. These filings noted that Christenson had received a "psychological," rather than a "psychiatric," examination but did little to explain the difference between the two or articulate any basis as to why Christenson should have received a second mental health evaluation. The motions were denied. Although the court did not rule the state psychologist's report inadmissible, the report was not introduced into evidence at trial.

9. At the hearing on the Motion for Funds with which to Hire Private Psychiatrist, trial counsel introduced no additional evidence but relied on the Bradley Center record excerpts already in the

record, without detailing in argument any of the specific findings of the Bradley Center staff or of the state psychologist other than the drastic drop in I.Q. (2/14/90 Tr. 134-36; *see also* 2/2/90 Tr. 13-32.) The court denied the motion. (See 2/14/90 Tr. 144.) A great deal of information was available to defense counsel to support the motion for funds to retain an expert: (1) the Bradley Center records (which they never obtained or reviewed in toto (Tr. 689)); (2) the Bradley Center clinical staff (whom they never contacted (Tr. 457, 465, 678; Px. 12 (Affidavit of David Ebron, M.S.W) at ¶ 8); (3) the state psychologist who had evaluated Christenson (whom they did not interview or consider using her report (Tr. 273, 479-80, 912-913)). Although defense counsel moved for funds to retain a psychiatric witness and argued that such assistance was necessary to the defense, when the court denied the motion for funds, defense counsel did not seek any other means of securing expert assistance and abandoned the issue of Christenson's mental health problems. (Tr. 604-05, 689.) Defense counsel did not avail themselves of the services, advice, or resources of several criminal, or capital, defense organizations active in Georgia, although they knew of the organizations' existence. (Tr. 425-26.) Defense counsel did not seek to determine whether a local mental health professional would assist the defense on a pro bono or reduced fee basis. (Tr. 604.) Defense counsel never explored the possibility of defraying some of the cost for such assistance, even though, they conceded, they had the means to do so. (Tr. 604-05,)

10. On January 4, 1990, the court denied the first Motion for Funds to Hire an Investigator (filed October 18, 1989) and on February 14 denied the second Motion for Funds to Hire an Investigator (filed February 2, 1990). Defense counsel asked for the assistance of an investigator, among other reasons, to interview law enforcement witnesses in relation to the voluntariness of Christenson's custodial statements, and to interview possible mitigation witnesses. According to their time records, defense counsel did very little factual investigation until the denial of the second Motion for Funds to Hire an Investigator one month before trial. (Px. 56.) Counsel traveled to Arkansas to interview the law enforcement witnesses less than two weeks before trial and *after* the

Jackson-Denno hearing on the voluntariness of the statements. Defense counsel did not interview most of the mitigation witnesses until less than one week before trial; some were interviewed by telephone after the trial began. (Px. 56.)

11. On February 14, 1990 (six months after their appointment to represent Christenson and less than six weeks prior to trial), defense counsel filed a motion to continue a Jackson-Denno hearing that would determine whether Christenson's custodial statements (which would form a key part of the State's case) would be admitted. Counsel had first filed a motion to suppress the statements in October 1989 (see Motion to Suppress Statements, filed October 18, 1999), but had done nothing to obtain a hearing on the statements' admissibility until February 1990. The trial court took up the motion to continue hearings on the day it was filed and heard defense counsel represent that the sole basis for the motion was that -- in the preceding six months -- they had not "had an opportunity to get to Arkansas and interview" witnesses in that state, including the law enforcement personnel who first arrested and interrogated Christenson. (2/14/90 Tr. 4.) The trial court was not persuaded that both of Christenson's lawyers had been unable to find a single day in the preceding six months to go to Arkansas and denied the motion to continue (2/14/90 Tr. 17), then *at defense counsel's request* delayed ruling on the admissibility of the statements until the business day before the beginning of the trial (2/14/90 Tr. 77-84). At the final pretrial conference, the court ruled that the statements could be presented to the jury. (3/16/90 Tr. 63.) At that pretrial conference, defense counsel informed the court that they were not prepared to proceed. The court construed this as another motion to continue, and summarily denied the motion. (3/16/90, Tr. 13, 21-22.)

12. The state's case during the guilt/innocence phase lasted one and one half trial days. The dominant witness in terms of time was G.B.I. Special Agent Gary Rothwell, and the bulk of Agent Rothwell's testimony on direct consisted of verbatim recitations of statements by Christenson: one oral statement which was reduced to writing was read to the jury and two statements recorded by G.B.I. agents -- one on audiotape and one on videotape -- were played to

the jury. (See 3/22/90 Tr. 126-33 (written statement); 3/22/90 Tr. 136-200 (State's Exhibit 32, audiotaped statement), 3/22/90 Tr. 204-242 (State's Exhibit 12, videotaped statement).) In each of these statements, Christenson described in detail his struggle with Oliver before the weapon discharged. Christenson also stated that he did not intend to shoot Oliver before the struggle started. Instead, he repeatedly stated that he intended to convince Oliver, with a display of the gun while the two were riding together, to turn over the truck to him. (See 3/22/90 Tr. 149-50, 181.) None of the statements heard by the jury referred to the participation of any other person or indicated that Christenson left Oliver after only one shot had been fired, and none of the statements referred to Christenson attempting to buy drugs from Oliver or to Oliver seeking any sexual favors from Christenson.

13. The presentation of the defense case occupies only 28 transcript pages (*see* 3/23/90 Tr. at 8-35); the *direct* testimony of the four witnesses called in the defendant's case in chief consumed only about fifteen pages of transcript. During the guilt/innocence phase in this case, defense counsel attempted to create doubt that Christenson had actually killed Oliver by suggesting that others were seen with his truck after Christenson left him. The four witnesses each testified that he or she had seen some vehicles on the side of the road some distance from where Oliver's body was discovered. Three of these witnesses testified to seeing a truck generally matching the description of Oliver's truck as late as 8:00 p.m. on the day Oliver and his truck disappeared. (3/23/90 Tr. 11, 19, 26.) Two testified to seeing people near the vehicles who did not match the description of either Oliver or Christenson (3/23/90 Tr. 21, 34.) The defense testimony was internally inconsistent and did not point clearly to any coherent conclusion. Kirby argued vaguely based on those four witnesses that "there could be other people involved" but that the police improperly failed to follow up on those leads. (3/23/90 Tr. 76.)

During the guilt/innocence phase in this case, defense counsel attempted to divert attention from Christenson's bad deeds by suggesting that Oliver, the victim, had a bad character and had contributed to the circumstances that led to his death. Specifically

counsel attempted to create the impression that Oliver cruised local teen hangouts and used drugs and his fancy truck with its flashy stereo to entice young people, especially boys, to have sex with him and that Oliver was killed when Christenson intended to trade guns for drugs and Oliver attempted to obtain sex from him instead. (3/21/90 Tr. 90, 154-56.) The court finds, based on the trial record and the testimony at the habeas corpus hearing, that defense counsel had uncovered virtually no admissible evidence to support the many rumors counsel had heard about Oliver's drug use and sexual practices. Trial counsel tendered no exhibits during the defense case in chief to add to those previously tendered during cross-examination of Agent Rothwell: an unopened condom package, an empty condom wrapper found in Oliver s truck and two boxes of condoms found in Oliver's apartment. With virtually no real evidence to put before the jury about Oliver's sexual practices, counsel was reduced to pointing out that condoms were found in Oliver's truck; that Oliver was an "unmarried" 31 year-old man who lived in his own apartment; that Christenson and Oliver had been in a "secluded spot"; and that some of Oliver's friends were teenage boys; counsel then left the jury to link the pieces, saying "come to what conclusions you may." (3/23/90 Tr. 82-86.) The gist of Kirby's closing argument was that the law enforcement officers investigating the case formed a theory of Oliver's death, ignored evidence inconsistent with that theory, and manipulated the vulnerable young suspect into confessing to their version of events. (3/23/90 Tr. 52-94.)

14. On March 23, 1990, the jury found Christenson guilty of malice murder and armed robbery and immediately turned to the penalty phase of the trial. The State introduced only one exhibit and called only one witness in aggravation. The exhibit, State's Exhibit 40 (Px. 53), was a copy of an indictment of Christenson for an auto theft committed a year prior to his arrest for Oliver's death. The witness, Detective Steven Cox of the Property Crimes unit of the Columbus Police Department, testified regarding a statement Christenson supposedly had made to him while Detective Cox was transporting Christenson to Columbus from Jackson, Tennessee, where he had been arrested on the warrant for auto theft. (3/23/90

Tr. 175, 186-87.) Detective Cox testified that Christenson had made a statement during the ride to Columbus regarding the theft for which he had been arrested, which involved a truck stolen while parked outside a stereo store. Detective Cox, referring to a police report he had prepared a year after the fact, and one day after Christenson's arrest for Oliver's murder, testified that Christenson had said that "he was going to rob the individual and get the keys [to the truck] and that he would kill him if he didn't get the keys." (3/23/90 Tr. 186-87.) In summation, the prosecutor argued that Christenson, despite being blessed with caring parents and every advantage, by the age of 19 was a career criminal and drug addict who had committed at least 23 thefts. (3/24/90 Tr. 181-82.) The prosecutor also argued that Christenson laid in wait for Oliver, planning to steal his truck at gunpoint, and that he shot Oliver five times -- the first four shots inflicted only superficial and non-fatal wounds and each gave him the opportunity to stop short of killing Oliver. (3/24/90 Tr. 180.) Defense counsel failed to object to this argument even though the state's own scientific evidence provided no support to any particular order in which the wounds were inflicted or that the fatal shot was the final one. (3/22/90 Tr. 373.)

15. During the penalty phase of the trial, defense counsel presented 19 witnesses and 27 exhibits. The witnesses included Christenson's parents, brother, grandfather, aunts, uncles, cousins, childhood friends, and former Little League coaches. Trial counsel testified that they prepared these witnesses to testify in mitigation by asking them to tell stories about "how Scott's childhood was a happy and a normal childhood." (Tr. 632). The adult family members testified, most very briefly, that Christenson was a loving, compliant child, active and talented in sports and art, and that after the devastating loss of his grandmother in 1984 when Christenson was 14 years old, he started to withdraw and his grades began to drop. They testified that Christenson began to get into trouble for stealing but that he had never before engaged in any violent behavior. The exhibits introduced in mitigation consisted of Christenson's school records (which showed that his grades had begun to drop prior to his grandmother's death), a number of photographs of Christenson in family groupings or in baseball settings, several baseball trophies

and a baseball signed by one of his coaches, and a number of drawings made by Christenson. When challenged by the prosecutor as to the purpose of these exhibits, trial counsel merely argued that each exhibit showed "something about the defendant's background and talents" or "something about his family life." (3/24/90 Tr. 3-24.)

16. In mitigation, defense counsel put on no evidence of Christenson's psychiatric impairments or troubled family history, although such evidence was readily available. Defense counsel also did not pursue or present mitigation evidence from Christenson's former jailers or from any of the victims of several of his prior property offenses. As the prosecutor repeatedly observed, the mitigation evidence offered by defense counsel consisted of the story that Christenson's childhood was normal, a happy sequence of baseball and creative expression interrupted only by the death of a grandmother. (3/24/90 Tr. 82-84, 95-96, 105-07, 157.) During closing argument, defense counsel admitted reneging on the opening argument promise that the evidence would show what brought those "two sad and aggrieved families" into the courtroom that day. Defense counsel offered no explanation for how Christenson ended up convicted of murder and armed robbery and told the jury no less than three times that he could give *no* reason for Christenson's actions. Counsel stated:

> We don't know what went wrong with Scott. We don't know what happened to Scott along the way. . . .
>
> We don't know what happened to Scott after the age of 14. When I look at Scott Christenson, I wonder just like everyone else what happened. I don't know what happened. . . .
>
> I can't tell you how a boy with his potential ended up in this courtroom convicted of murder and armed robbery. When I look at his life, I can't explain it.

(3/24/90 Tr. 191-94.) Defense counsel said "I'm not telling you that Scott deserves mercy" and asked for mercy only for Christenson's family. Defense counsel also argued that it was a "horrible crime"

and that Christenson should be punished severely but that life imprisonment was a severe enough punishment. Counsel offered "no excuses for what he has done," but argued that there was hope that Christenson could be redeemed. (3/24/90 Tr. 192-93, 195, 197.) Defense counsel urged the jury that its decision had to be unanimous. (3/24/90 Tr. 192.) The court charged the jury that its verdict as to penalty had to be unanimous. (3/24/90 Tr. 203.) At the conclusion of the penalty phase on March 24, 1990, the jury voted unanimously to recommend the death penalty. (3/24/90 Tr. 213-14.)

17. Christenson unsuccessfully appealed his conviction and his sentences of life imprisonment and death. Bunn continued as Christenson's counsel, along with Fulbright & Jaworski of Washington, D.C., throughout Christenson's first appeal. As co-counsel, Bunn consulted on the issues to be briefed, reviewed and commented on the initial draft of the brief, and provided comments on oral argument. (Tr. 306-07, 367-68, 681, 681; Deposition of Frederick Robinson, Esq. ("Robinson Dep.") at 18, 23; see also Px. 22 (Affidavit of Charlotta Norby) (describing continuing involvement of Bunn in proceedings subsequent to Christenson's conviction).) Fulbright & Jaworski regarded Bunn as "co-counsel" (Robinson Dep. at 24), and Bunn considered himself Christenson's counsel and Christenson his client through the conclusion of Christenson's direct appeals. (Tr. 370-71.)

18. Christenson's first appeal was filed on April 20, 1990, seeking reversal of the conviction and sentence, in which he raised a number of claims. (See *Christenson I.*) On March 15, 1991, the Georgia Supreme Court affirmed the conviction and remanded Christenson's sentence to the trial court to (1) determine whether the District Attorney had a good faith basis for questioning mitigation witnesses at the sentencing phase of the trial about Christenson's prior, juvenile offenses (which had been omitted from the prosecution's pre-trial notice, in violation of O.C.G.A. § 17-10-2(a)), (c)), and (2) conduct a Jackson-Denno hearing as to the voluntariness of the custodial statement to which Detective Cox had testified during the State's case in aggravation. *Christenson I*, 261 Ga. at 90-92 (1991). Dissenting, Justice Benham voted for reversal of both the conviction

and sentence, reasoning that the jury would "naturally and necessarily" have presumed that the District Attorney's improper comments on the alleged absence of an expression of remorse by Christenson were commentary on Christenson's invocation of his right not to testify. Id. at 92-93. Justice Benham also concluded that a remand of the death sentence for a belated demonstration of the good faith and reliability of the District Attorney's bases for inquiry into prior offenses or conduct of Christenson could not cure the fundamental flaw in the state's presentation of, and arguments based on, prejudicial matter that lacked an evidentiary basis. Id. The Georgia Supreme Court denied a motion for reconsideration, and the United States Supreme Court denied n petition for a writ of certiorari. *Christenson* v. *Georgia*, 502 U.S. 855 (1991).

19. On remand, Judge Smith, who had presided at Christenson's trial, recused himself because his law clerk at the time of the remand proceedings had served as an Assistant District Attorney at the time of Christenson's arrest and trial, and the case was assigned to Judge Robert B. Struble for further proceedings. *See* Amended Petition, ¶¶ 14-15; Amended Answer ¶ 1. Judge Struble found that the State had adequately demonstrated its good faith and the reliability of the questions about Christenson's juvenile record. (April 9, 1992 Judgment at 4.) Judge Struble further found that the State had met its burden of showing by a preponderance of the evidence that Christenson's prior custodial statement to Detective Cox had been made voluntarily. (Id. at 16.) On December 2, 1992, the Georgia Supreme Court affirmed Christenson's death sentence. *Christenson* v. *State*, 262 Ga. 638, 638 (1992). Justice Benham dissented on the same grounds as those raised in *Christenson I*. Christenson again unsuccessfully petitioned the Supreme Court of the United States for certiorari. *Christenson* v. *Georgia*, 508 U.S. 927 (1993).

20. At the hearing on the habeas corpus petition, Christenson presented the testimony of two mental health expert witnesses who testified regarding their post-trial evaluations of Christenson. The first, Dr. Michael Gomez, a psychiatrist, found that Christenson suffers from the following disorders; an "anxiety disorder," characterized by a "pervasive sense of nervousness or anxiety [even]

in a normal non[-]threatening environment" (Tr. 133); features of "other anxiety disorders," including both obsessive-compulsive disorder and an impulse-control disorder (Tr. 134-38); an "affective disturbance," specifically, "atypical depression" characterized by "exquisite sensitivity to rejection," as well as "hyperphasi[a]" (excessive eating) and "hypersomni[a]" (excessive sleeping) (Tr. 138-39.); polysubstance abuse (Tr. 139); and an avoidant personality disorder with some narcissistic features (Tr. 140-41).

At the Hearing, Christenson presented the testimony of Jan Vogelsang, a licensed clinical social worker and an expert in conducting psychosocial assessments. Ms. Vogelsang performed such an assessment of Christenson, interviewed a significant number of Christenson's family members, and twice interviewed Christenson himself, reviewed affidavit testimony provided by a wide range of people, reviewed documents, including medical, probate, marriage and court records, and conferred with other experts and consulted a wide range of scholarly literature. (Tr. 998-1004.) Ms. Vogelsang prepared a specialized version of a family tree, called a "genogram," to illustrate Christenson's family, its relationships, and patterns of behavior and mental or emotional disorders. (Tr. 1006.) Ms. Vogelsang testified that a "quite high" proportion of Christenson's relatives were alcohol and/or drug abusers, including all four of his grandparents (Tr. 1040, 1064), and that a "significant" proportion suffered from some discernible affective disorder and/or had been institutionalized in mental hospitals, including Christenson himself, his mother and his paternal grandmother, or possessed some form of identifiable cognitive impairment or were mentally retarded, including Christenson's brother, mother and maternal grandfather (Tr. 1041, 1064). Ms. Vogelsang reviewed the complete file from the Bradley Center, which trial counsel failed to do, and discussed extensive information available in that file regarding serious long-standing problems in Christenson's family life, including an incident when Christenson was nine years-old when his mother took a gun and

announced she was going to get in the car and to shoot herself.[16] (Px. 67 at SC0006907.) She also gathered extensive information from family members and friends which showed a dysfunctional and abusive home environment during Christenson's childhood. This history, coupled with contemporary knowledge of "the body and biochemistry and genetics," led her to conclude that: "There was an accumulation of harmful factors in Scott's life that were so severe as to put him at a potential[ly] dangerous risk to end up in serious trouble" and to predispose him to abuse alcohol and drugs. (Tr. 1062-64).

CONCLUSIONS OF LAW

I. GROUNDS BARRED BY HAVING BEEN LITIGATED ON DIRECT APPEAL

21. Georgia law is well settled that, "[a]fter an appellate review the same issues will not be reviewed on habeas corpus." *Elrod* v. *Ault*, 231 Ga. 750, 750 (1974) (citations omitted). An issue which has been "actually litigated, i.e., raised and decided, in the appellant's direct appeal" cannot be reasserted in habeas corpus proceedings. *Gunter* v. *Hickman*, 256 Ga. 315, 316 (1) (1986) (citation omitted). Accordingly, on habeas corpus review, this court may not revisit any issue already addressed by the Georgia Supreme Court on Christenson's direct appeal. Any claim of error or violation of Christenson's rights decided adversely to him on direct appeal is barred at this stage, and habeas corpus relief is hereby denied as to each such claim of error or constitutional violation. For each ground barred by having been previously litigated, the court will set out below the specific claim asserted by Christenson in the Amended Petition and the corresponding portion of the Supreme Court's decision on the direct appeal.

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[16] Trial counsel did not see "anything negative" about Christensen's parents in the Bradley Center file. Tr. 299-300.

A. Alleged Prosecutorial Misconduct

1. Guilt/Innocence Phase: Comments on the Absence of an Expression of Remorse

22. In ¶ 84(a) of the Amended Petition, Christenson argued that comments regarding his failure to demonstrate remorse for the crimes charged made by the prosecutor during the guilt/innocence phase improperly commented on his failure to testify. In the first decision issued by the Supreme Court, *Christenson* v. *State*, 261 Ga. 80 (1991) ("*Christenson I*"), in which the Court affirmed the guilty verdict but remanded on two penalty phase issues, the Court stated the standard for reversing for improper comments by the prosecutor and then addressed the issue of the prosecutor's comments on Christenson's alleged failure to demonstrate remorse as follows:

> There was no manifest intention to comment upon Christenson's failure to testify, nor would the jury have "naturally and necessarily" taken it to be such comment. Since the defendant did not exercise his right to remain silent during his custodial interrogation, the prosecutor was entitled to comment on his pre-trial omissions.

Christenson I, 261 Ga. at 88 (7)(a). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the prosecutor's comments denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

2. Sentencing Phase

a. Victim Impact Comments

23. In ¶ 85(b) of the Amended Petition, Christenson argued that during the sentencing phase the prosecutor made improper statements regarding the impact of the crime on the victim and his family. In *Christenson I*, the Supreme Court addressed the victim-impact issue as follows: "We do not find that the prosecutor's limited references to the victim's family violated the proscription on victim-impact evidence." *Christenson I*, 261 Ga. at 89(7)(c)

(citation omitted). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the prosecutor's comments denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

b. Comments on the Absence of an Expression of Remorse

24. In ¶ 95(c) of the Amended Petition, Christenson argued that comments regarding his failure to demonstrate remorse for the crimes charged made by the prosecutor during the sentencing phase improperly commented on his failure to testify. In *Christenson I*, the Supreme Court addressed the issue of the prosecutor's comments during the sentencing phase on Christenson's alleged failure to demonstrate remorse as follows:

> Comments based on courtroom observation of a defendant's demeanor do not infringe on the defendant's Fifth Amendment rights. At the sentencing phase, " [s]ound policy reasons exist for allowing a jury to consider the courtroom demeanor of a defendant." As we pointed out in *Isaacs* v. *State*, 259 Ga. 717, 723 (9) (386 S.E.2d 316) (1989), "the defendant's remorse or lack thereof is a permissible area of inquiry during sentencing." The prosecutor in this case was entitled to comment about the defendant's apparent lack of remorse during the presentation of evidence concerning the death of the victim.

Christenson I, 261 Ga. at 89 (7)(b) (citations omitted). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the prosecutor's comments denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

c. References to Prior Offenses

25. In ¶ 85(d) of the Amended Petition, Christenson argued that the prosecutor violated his constitutional rights during the sentencing phase of the trial by making repeated references to Christenson's alleged prior offenses in violation of the required pretrial notification to the defendant. O.C.G.A. § 17-10-2(a), (c). In *Christenson I*, the Supreme Court remanded the case to the trial court "for a determination of whether the district attorney's questions to the defendant's character witnesses are based on reliable information supported by admissible evidence." *Christenson I*, 261 Ga. at 92 (12). In the second direct appeal decision issued by the Supreme Court, *Christenson* v. *State*, 262 Ga. 638 (1992) ("*Christenson II*"), the Supreme Court addressed the trial court's findings on remand as follows:

> The record supports the findings of the remand court and its conclusion that the prosecutor's cross-examination of the defendant's sentencing-phase witnesses was proper.

Christenson II, 262 Ga. at 638 (2). To the extent Christenson's arguments in ¶ 85(d) of the Amended Petition were raised and litigated in the direct appeal, the court finds that the issue that the prosecutor's comments and questions denied him a fair trial is barred at this stage, and the court denies the petition for writ of habeas corpus on this ground. To the extent Christenson's argument in ¶ 85(d) exceeds the scope of the remand and decision on direct appeal, the issue has been waived. *See* ¶¶ 41, 46 below.

d. Comments on Matters Outside the Record

26. In ¶ 85(c) of the Amended Petition, Christenson alleged that during closing argument, the prosecutor made a series of improper comments on matters outside the record, including: remarking that the case was worse than other cases he had seen; stating that there was no room in prison for Christenson and suggesting that he might be released from prison; asserting that others would be deterred only if Christenson was given the death penalty; and blaming an increase in crime rates on a decrease in the use of the death penalty.

27. The court finds that defense counsel objected to the prosecutor's closing argument on the grounds that he was improperly comparing the crime to other crimes. (3/24/90 Tr. 170.) The court finds that this issue has been waived by failure to raise it on direct appeal. *See* ¶ 41 below. With respect to the other specific comments identified by Christenson, upon examination of the cited portions of the transcript the court finds that the comments were not the subject of objections at trial. Although it is not clear from the decisions on direct appeal that the Supreme Court specifically considered each of the allegedly improper comments, the Supreme Court held in *Christenson I* as follows: "Christenson complains about portions of the prosecutor's closing argument not objected to at trial. Absent timely objections we find no reversible error." *Christenson I*, 261 Ga. at 90 (7)(e) (citation omitted). Accordingly, the court finds that Christenson's arguments in ¶ 85(e) of the Amended Petition were raised and litigated in the direct appeal and found to be procedurally defaulted at that stage, and the issue is therefore barred at this stage by having been litigated an direct appeal. In the alternative, to the extent Christenson's argument in ¶ 85(e) exceeds the scope of the decision on direct appeal, the issue has been waived. *See* ¶¶ 41, 46 below. The court finds that the claim that the prosecutor's comments denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

e. Comments Regarding the Prosecutor's Personal Beliefs and on Religion

28. In ¶ 85(f) of the Amended Petition, Christenson alleged that the prosecutor made improper comments about religion, referring to retribution, repentance and his own personal beliefs during closing argument. Defense counsel objected that the prosecutor was improperly arguing religion. (3/24/90 Tr. 174, 209-10). In *Christenson I*, the Supreme Court addressed the issue of the prosecutor's comments regarding religion during the sentencing phase as follows:

> The prosecutor did not argue impermissibly by explaining "retribution" as "[w]hat we learned in Sunday School as 'an eye for an eye and a tooth for a tooth.'"

Christenson I, 261 Ga. at 89-90(7)(d) (citations omitted). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the prosecutor's comments denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus an this ground.

B. Alleged Trial Court Errors

1. Failure to Exclude Victim Impact Evidence

29. In ¶¶ 86-88 of the Amended Petition, Christenson argued that the trial court erred in failing to exclude reference to the impact of the crime on the victim and his family, failing to give a curative instruction regarding such comments, and failing to exclude during the guilt/innocence phase pictures of the victim, alive and dead. In *Christenson I*, the Supreme Court addressed the issue of the victim-impact evidence as follows: "We do not find that the prosecutor's limited references to the victim's family violated the proscription on victim-impact evidence." *Christenson I*, 261 Ga. at 89(7)(c) (citations omitted). Because the prosecutor's comments were not improper, it necessarily follows that the trial court's failure to exclude them was not error. Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the trial court's ruling denied him a fair trial by failing to exclude such comments is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

2. Failure to Exclude Other Comments

30. In ¶¶ 89-90 of the Amended Petition, Christenson alleged that the trial court erred in failing to exclude improper comments that Christenson failed to express remorse and alleged generally that the court allowed the prosecutor to mischaracterize the evidence, assert facts not in evidence, express his own views regarding the sentencing process, parole, and the role of religion and morality in the jurors' sentencing decision. In *Christenson I*, the Supreme Court addressed many issues of alleged prosecutorial misconduct

during the sentencing phase. *Christenson I*, 261 Ga. at 87-90(7)(a-e). Accordingly, the court finds that Christenson's arguments in ¶¶ 89-90 of the Amended Petition were in part raised and litigated in the direct appeal, and the issue is to that extent barred at this stage by having been litigated on direct appeal. In the alternative, to the extent Christenson's argument in ¶¶ 89-90 exceeds the scope of the decision on direct appeal, the issue has been waived. *See* ¶¶ 41, 46 below. The court denies the petition for writ of habeas corpus on this ground.

3. Failure to Provide Funds for a Psychiatrist

31. In ¶¶ 93-94 of the Amended Petition, Christenson alleged that the trial court deprived him of a fair trial by denying his motion for funds to retain a psychiatrist. In *Christenson I*, the Supreme Court addressed the issue of the denial of funds for a psychiatrist as follows:

> Christenson presented no evidence by which the court could reasonably have inferred that the question of sanity would be a significant factor at the guilt phase of the trial.
>
> * * *
>
> As noted above, the state presented no psychiatric (or expert psychological) testimony at the sentencing phase of the trial. Moreover, this is not a case in which the defendant might be entitled to psychiatric assistance at the sentencing phase even where the state does not present psychiatric testimony.... [The evidence] does not show that the defendant suffers from any serious mental disorder. It was not abuse of discretion to deny the defendant's request for court-funded independent psychiatric assistance.

Christenson I, 261 Ga. at 83(2)(c) (citations omitted). Because this issue was raised and decided in Christenson's direct appeal the court finds that the claim that the trial court's ruling denying his motion for funds to retain a psychiatrist denied him a fair trial is barred as

a matter of law and denies the petition for writ of habeas corpus on this ground.

4. Failure to Proscribe Use of Evidence and Hearsay Regarding Alleged Prior Offenses

32. In ¶¶ 97-98 of the Amended Petition, Christenson asserted that the trial court erred by failing to exclude the prosecutor's repeated references to his prior offenses. As discussed above, the Supreme Court on direct appeal, remanded to the trial court for a hearing on the issue of whether the district attorney had a good faith basis for certain questions concerning prior offenses asked during the penalty phase. In *Christenson II*, the Supreme Court affirmed the trial court's finding on remand that the district attorney's questions about prior offenses were based on reliable information supported by admissible evidence as follows:

> The record supports the findings of the remand court and its conclusion that the prosecutor's cross-examination of the defendant's sentencing-phase witnesses was proper....

Christenson II, 262 Ga. at 638(2). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the trial court's rulings regarding the prosecutor's references to prior offenses denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

5. Failure to Give Instruction as to Voluntary Manslaughter and to Modify the Verdict Form

33. In ¶¶ 99-102 of the Amended Petition, Christenson asserted that the trial court erred by failing to charge the jury that it could return a verdict of voluntary manslaughter. In *Christenson I*, the Supreme Court addressed the issue of the requested voluntary manslaughter instruction as follows: "The court did not err by refusing to charge the jury on voluntary manslaughter." *Christenson I*, 261 Ga. at 87(6) (citations omitted). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the trial court's failure to give the

voluntary manslaughter charge denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

6. Admission of Custodial Statements

34. *Statements regarding the crime charged.* In ¶ 105 of the Amended Petition, Christenson argued generally that the trial court erred by admitting involuntary custodial statements. As discussed below in ¶ 36, on direct appeal, Christenson argued that the custodial statements he gave regarding the crime charged were involuntary in part because the interrogating officer misrepresented to him the scope of the inquiry, suggesting that the officer was interested only in the theft of the truck. The Supreme Court held that Christenson's statements were voluntary and admissible. *Christenson I*, 261 Ga. at 85-86(3). To the extent this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the trial court's failure to exclude such statements denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus on this ground. To the extent Christenson's argument exceeds the scope of the decisions on direct appeal, the court finds that such claims have been waived. *See* ¶¶ 41, 46 below.

35. *Statements regarding an extrinsic crime.* Also in regard to ¶ 105 of the Amended Petition, the court admitted at trial statements Christenson gave regarding an earlier truck theft which was introduced during the sentencing phase. On direct appeal, the Supreme Court affirmed the guilty verdict and remanded to the trial court for a hearing on the issue of whether Christenson's confession to the earlier vehicle theft was voluntary and admissible. In *Christenson II*, the Supreme Court affirmed the trial court's finding that Christenson's "confession to an extrinsic crime was properly admitted in evidence in this case." *Christenson II*, 262 Ga. at 638(2). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the trial court's failure to exclude the statement denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

7. Failure to Exclude Custodial Statements

36. In ¶¶ 110-15 of the Amended Petition, Christenson argued more specifically that the trial court erred by admitting custodial statements where the interrogating officer misrepresented to Christenson the scope of the inquiry, suggesting that the officer was interested only in the theft of the truck. In *Christenson I*, the Supreme Court addressed this specific issue and held that the statements regarding the crime charged were voluntary and admissible despite the officer's representation:

> We hold that the officer's conduct did not amount to the kind of "affirmative misrepresentation" by the police which would "invalidate a suspect's waiver of the Fifth Amendment privilege." The evidence supports the trial court's conclusion that the defendant's statements were voluntary and admissible.

Christenson I, 261 Ga. at 86(3) (citations omitted). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the trial court's failure to exclude such statements denied him a fair trial is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

8. Failure to Exclude "Prior Offenses" References

37. In ¶ 116 of the Amended Petition, Christenson reiterated his claim that the trial court erred during the sentencing phase of the trial by allowing the prosecutor to make repeated references to prior offenses purportedly committed by Christenson and further erred in failing to give curative instructions to the jury. In *Christenson I*, the Supreme Court remanded the case to the trial court "for a determination of whether the district attorney's questions to the defendant's character witnesses are based on reliable information supported by admissible evidence." *Christenson I*, 261 Ga. at 92(12). In *Christenson II*, the Supreme Court addressed the trial court's findings on remand as follows:

> The record supports the findings of the remand court and its conclusion that the prosecutor's cross-examination of

the defendant's sentencing-phase witnesses was proper .
. . .

Christenson II, 262 Ga. at 638(2). To the extent Christenson's arguments in ¶ 116 of the Amended Petition were raised and litigated in the direct appeal, the court finds that the issue that the prosecutor's comments and questions denied him a fair trial is barred at this stage by having been litigated on direct appeal, and the court denies the petition for writ of habeas corpus on this ground. To the extent Christenson's argument in ¶ 116 exceeds the scope of the remand and decision on direct appeal, the issue has been waived. *See* ¶¶ 41, 46 below.

9. Exclusion of Jurors (Witherspoon)

38. In ¶¶ 120-22 of the Amended Petition, Christenson argued that the trial court erred by excluding prospective jurors based upon their views concerning the death penalty pursuant to *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Christenson further argued that the trial court erred by accepting the prosecutor's allegedly pretextual reasons for excluding jurors for cause. In *Christenson I*, the Supreme Court addressed the issue of the exclusion of jurors based on opposition to the death penalty as follows: "The trial court's rulings on the qualifications of prospective jurors were 'within the deference due the trial judge's determination.'" *Christenson I*, 261 Ga. at 86(4) (citation omitted). To the extent Christenson's arguments in ¶¶ 120-22 of the Amended Petition were raised and litigated in the direct appeal, the court finds that the issue that the trial court's exclusion of certain jurors denied him a fair trial is barred at this stage by having been litigated on direct appeal, and the court denies the petition for writ of habeas corpus on this ground. To the extent Christenson's argument in ¶¶ 120-22 exceeds the scope of decision on direct appeal, the issue has been waived. *See* ¶¶ 41, 46 below.

10. Whether the Imposition of a Death Sentence in This Case Was Disproportionate and Unwarranted

39. In ¶¶ 128-31 of the Amended Petition, Christenson alleged that his death sentence was unconstitutional because the Georgia capital sentencing statute is unconstitutional on its face and as applied, because the Supreme Court was deprived of a sufficiently accurate and complete record to permit a meaningful proportionality analysis, and because the Supreme Court erred in its proportionality analysis. In *Christenson I*, the Supreme Court held as follows:

> The evidence supports the jury's finding that the offense of murder was committed during the commission of the offense of armed robbery. OCGA §§ 17-10-30(b)(2); 17-10-35(c)(2). We do not agree with the defendant's contention that the case is not aggravated enough to warrant a death sentence.

Christenson I, 261 Ga. at 92(10). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the death sentence imposed was disproportionate and unwarranted is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

C. Whether the Imposition of the Death Penalty in This Case Demonstrates that the Georgia Capital Sentencing Statute is Unconstitutionally Vague and Overbroad and Was Applied Arbitrarily and Capriciously at the Unguided Discretion of the Jury

40. In ¶ 132 of the Amended Petition, Christenson alleged that the capital sentencing statute was applied in his case in an arbitrary and capricious manner. In *Christenson II*, the Supreme Court affirmed the death sentence and held as follows:

> Now that we have the benefit of the proceedings on remand, we find that Christenson's death sentence was not imposed as the result of passion, prejudice, or other arbitrary factor. OCGA § 17-10-35 (c) (1). His death sentence is neither excessive nor disproportionate to penalties imposed in similar

> cases, considering both the crime and the defendant. OCGA § 17-10-35(c)(3). The similar cases listed in the Appendix support the imposition of a death sentence in this case.

Christenson II, 262 Ga. at 638(3). Because this issue was raised and decided in Christenson's direct appeal, the court finds that the claim that the death penalty was unfairly imposed is barred as a matter of law and denies the petition for writ of habeas corpus on this ground.

II. GROUNDS WAIVED BY FAILURE TO RAISE ON DIRECT APPEAL

41. The claims discussed in the preceding section are procedurally barred because they were actually litigated in Christenson's direct appeal; he raised each alleged error or violation in the appeal, and the Georgia Supreme Court decided the issue adversely to him. The claims discussed in this section are also procedurally barred, not because they *were* litigated, but because they *could have been* litigated at an earlier stage and were not. Georgia law clearly requires that errors or deficiencies of the trial be objected to at trial and pursued on appeal if possible. The Georgia Supreme Court stated the rule in the seminal case of *Black* v. *Hardin*, as follows:

> a failure to make timely objection to any alleged error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus. However, an otherwise valid procedural bar will not preclude a habeas corpus court from considering alleged constitutional errors or deficiencies if there shall be a showing of adequate cause for failure to object or to pursue on appeal and a showing of actual prejudice to the accused. Even absent such a showing of cause and prejudice, the relief of the writ will remain available to avoid a miscarriage of justice where there has been a substantial denial of constitutional rights.

Black v. *Hardin*, 255 Ga. 239, 240(4) (1985). In *Valenzuela* v. *Newsome*, the Supreme Court explained that a showing of "miscarriage of justice":

> demands a much greater substance [than procedural irregularity or reversible error], approaching perhaps the imprisonment of one who, not only is not guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry. (A plain example is a case of mistaken identity.)

Valenzuela v. *Newsome*, 253 Ga. 793, 796(4) (1985). The Court noted that the core purpose of the writ of habeas corpus, "to free the innocent wrongfully deprived of their liberty," outweighs technical procedural bars. Id.

42. *Alleged Prosecutorial Misconduct*. In ¶ 83 of the Amended Complaint, Christenson alleged that the prosecutor violated his rights by failing to recuse himself from the case even though he was too "emotionally invested" in the case to be impartial in the decision of whether to seek the death penalty. In ¶ 84(b), Christenson alleged that the prosecutor improperly made derogatory comments about his trial counsel. In ¶ 84(c), Christenson alleged that the prosecutor improperly commented on matters not in evidence such as Christenson's alleged repeated thefts of gasoline, the condition of the body, and an odor at the crime scene. In ¶ 85(a), Christenson alleged that the prosecutor violated his rights during the sentencing phase by mischaracterizing the evidence, such as suggesting that the lethal shot had been the final shot. In ¶ 85(d), Christenson argued that the prosecutor violated his constitutional rights at trial by making repeated references to prior offenses purportedly committed by Christenson.[17] In ¶ 85(g), Christenson alleged that during the sentencing phase the prosecutor improperly commented on Christenson's race, calling him "a pretty little white boy." In ¶ 85(h), Christenson alleged that the prosecutor violated his rights during the sentencing phase by minimizing the role of mitigating considerations in the determination of the sentence.

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[17] To the extent Christenson's claim that the prosecutor violated his rights by his references to alleged prior offenses was litigated on direct appeal, it is barred by having been litigated on direct appeal. See ¶ 25.

43. *Alleged Trial Court Errors.* In ¶¶ 91-92 of the Amended Complaint, Christenson alleged that the trial court erred by refusing to grant a continuance at the start of the trial. In ¶¶ 95-96, Christenson alleged that the trial court erred by refusing to grant his motion for funds to hire an investigator. In ¶ 103, Christenson alleged that the trial court erred by improperly restricting his attorneys' voir dire of the prospective jurors. In ¶ 104, Christenson alleged that the state failed to comply with its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963). In ¶ 106, Christenson alleged that the trial court erred by admitting evidence identifying the trial judge as a prosecutor in a criminal matter involving Christenson. In ¶¶ 107-08, Christenson alleged that the trial court erred by failing to instruct the jury that a less-than-unanimous verdict as to sentence would result in a life sentence and failing to modify the verdict form accordingly. In ¶ 109, Christenson alleged that the trial court erred by failing to instruct the jury that any lingering doubt as to guilt had to be considered as a factor in mitigation. In ¶¶ 117-18, Christenson alleged that the trial court erred by failing to exclude a videotaped statement which depicted Christenson wearing prison attire, shackles, and handcuffs. In ¶ 119, Christenson alleged that the trial court erred by failing to exclude several photographs of the victim's body.

44. In ¶¶ 123-26, Christenson alleged that the trial court erred by failing to require the prosecutor to provide a race-neutral explanation for exercising peremptory strikes against African-American prospective jurors in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986) and *Powers* v. *Ohio*, 499 U.S. 400 (1991). Christenson raised this issue on appeal, and the Supreme Court noted at that time that the issue had been waived by failure to object at trial, as follows: "Pretermitting any question of this defendant's standing to raise the issue, he may not raise it for the first time on appeal." *Christenson I*, 261 Ga. at 87(5) (citation and footnote omitted). The claim that the trial court erred by failing to question the prosecutor regarding jury strikes has been waived, and the court denies the petition for writ of habeas corpus on this ground.

45. Because any claims of error or deficiency in the trial to which Christenson failed to make a timely objection at trial or which he

failed to pursue an appeal are precluded from review by writ of habeas corpus (and absent a showing of cause and prejudice or an impending miscarriage of justice), claims of error or violations of Christenson's rights which are raised for the first time in his Amended Petition have been waived and cannot be considered by the court at this stage. The court finds that Christenson has not alleged any facts to show adequate cause for why any claim of prosecutorial misconduct at trial or trial court errors now raised could not have been raised and litigated on direct appeal, such as post-appeal discovery of new facts or changes in the applicable law, except the alleged inadequate performance by his attorneys in preserving the issues at trial or raising them on appeal. Christenson generally argued that claims which were not preserved for appeal by objection at trial or which could have been raised on appeal but were not nevertheless have *not* been procedurally defaulted because the failure to object at trial or to raise those issues on appeal constitutes ineffective assistance of counsel sufficient to satisfy the "cause" standard of *Black* v. *Hardin*. Petitioner's Memorandum of Law in Support of His Amended Petition for Writ of Habeas Corpus at ¶¶ 298-300. The court finds, however, that even if counsel's deficient performance satisfies the "cause" prong, Christenson has not shown that the identified instances of alleged prosecutorial misconduct or trial court error were of sufficient importance that they prejudiced his defense *with regard to the verdict of guilty* such that the otherwise valid procedural bar should be excused. Because the court has found below that trial counsel was ineffective on several grounds *with regard to the sentence of death,* and therefore the death sentence is vacated on other grounds, the court declines to consider whether the performance of trial and appellate counsel was inadequate as to the issues listed here such that there is adequate cause under *Black* v. *Hardin* to excuse the otherwise valid procedural bar.

46. Some claims as set out in the Amended Petition are a mixture of claims litigated in the direct appeal and claims not previously raised and decided. To the extent Christenson's claims in the Amended Petition exceed the scope of the two decisions on direct appeal, the court finds that such claims are waived and procedurally

barred pursuant to *Black* v. *Hardin*, 255 Ga. 239 (1985), and the court denies the petition for writ of habeas corpus as to such issues. In the alternative, to the extent Christenson's claims *were* raised and decided in the direct appeal, the court finds that such claims are barred by having been litigated on direct appeal pursuant to *Elrod* v. *Ault*, 231 Ga. 750 (1974) and *Gunter* v. *Hickman*, 256 Ga. 315 (1986), and the court denies the petition for writ of habeas corpus on those grounds.

47. In ¶ 127, Christenson asserted generally that the Unified Appeal Procedure, O.C.G.A. § 17-10-36, on its face deprived him of certain constitutional rights. Christenson failed to demonstrate adequate cause for failure to pursue this issue on appeal or that a miscarriage of justice will result unless this court considers this claim. Accordingly, the claim that the use of the Unified Appeal Procedure deprived him of a fair trial has been waived, and the court denies the petition for writ of habeas corpus on this ground. Furthermore, the Georgia Supreme Court has considered constitutional challenges to the Unified Appeal Procedure (the "UAP") many times and unequivocally held that the procedure does not violate the constitutional guarantees of equal protection and due process and that it does not violate a capital defendant's rights to a fair trial, to counsel or to remain silent. In an early case, *Sliger* v. *State*, 248 Ga. 316, U.S. *cert. denied*, (1981) the defendants challenged the UAP on several grounds. The defendants claimed that the UAP violated due process guarantees by providing the prosecution with a comprehensive discovery tool without providing a reciprocal means of discovery to the defense. The defendants argued that the UAP violated equal protection guarantees by imposing burdens on capital defendants which were not imposed on other criminal defendants. Next, the defendants argued that the UAP violated their right to remain silent by having the trial court offer a capital defendant an opportunity to voice any objections he had to his counsel's performance. Finally, the defendants argued that the UAP violates due process because it deprives a defendant of the right to petition for writ of habeas corpus on the ground of ineffective assistance of counsel. The Court found that none of these arguments had merit and affirmed the conviction. Id. at 321.

See also Tharpe v. *State*, 262 Ga. 110, U.S. *cert. denied*, (1992) (no merit to constitutional attacks on the UAP); *Rogers* v. *State*, 256 Ga. 139, U.S. *cert. denied*, (1986) (same; habeas case). Likewise, in addition to the waiver of this issue by failure to raise it on the direct appeal, this court finds that Christenson's constitutional attacks on the Unified Appeal Procedure lack merit.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

48. The court finds as a matter of law that Christensen's claim that due to the ineffectiveness of counsel at the trial and on appeal he has been denied his constitutional right to counsel remains viable and subject to this court's consideration on habeas corpus review. Georgia law clearly provides that an ineffective assistance of counsel claim need not be raised until such time as trial counsel no longer represents the defendant. *See e.g.*, *White* v. *Kelso*, 261 Ga. 32 (1991). The Supreme Court of Georgia has emphasized that "any allegation of a violation of the right to counsel should be made at the earliest practicable moment" or it will be deemed waived. Id. at 32. The "earliest practicable moment" may be on motion for new trial or on direct appeal, if the proceeding "marks the first appearance of new counsel." Id. However,

> Because *an attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness*, claims of ineffective assistance of counsel are often properly raised for the first time in a habeas corpus petition.... The rule is consistent: New counsel must raise the ineffectiveness of previous counsel at the first possible stage of post-conviction review.

Id. (emphasis supplied). In this case the facts clearly show that attorney Richard Bunn represented Christenson at trial, on motion for new trial and during the direct appeal. Not only was Bunn counsel of record, but he also participated in the proceedings to some extent. *See* ¶ 17. The first appearance of new counsel in connection with a proceeding in which trial counsel was not also attorney of record is this petition for writ of habeas corpus. Accordingly, Christenson's claim for ineffective assistance of counsel has not been defaulted.

A. The *Strickland* Standard

49. A claim of ineffective assistance of counsel is grounded in the general right to counsel guaranteed to criminal defendants by the Sixth Amendment to the United States Constitution and Article I, Section I of the Georgia Constitution. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the United States Supreme Court adopted a two-pronged approach to reviewing ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. The Court warned that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

The following year, the Supreme Court of Georgia adopted the *Strickland* standard for judging claims of ineffective assistance of counsel in *Smith* v. *Francis*, 253 Ga. 782 (1985). Regarding the first prong, the *Smith* court explained that the constitutional guarantee is for "reasonably effective assistance" of counsel and that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances . . . from counsel's perspective at the time" and not with the benefit of hindsight. *Smith*, 253 Ga. at 783(l). To prevail, the defendant must overcome a strong presumption that "counsel's conduct falls within the wide range of reasonable professional conduct and that all significant decisions were made in the exercise of reasonable professional judgment." Id. To prevail on the second prong and show prejudice, the defendant must prove that "but for counsel's unprofessional

errors, the result of the proceeding would have been different," i.e., the jury would not have convicted or recommended death. Id. at 783-84. In *Smith*, the petitioner argued that his counsel was ineffective because he asserted an unfounded insanity defense, but the habeas court found that the trial counsel's choice of an insanity defense was reasonable under the circumstances and denied relief. In cases where "inadequate representation" is alleged, the Georgia courts have focused the "critical factual inquiry" on

> whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy.

Hawes v. *State*, 240 Ga. 327, 329 (1977) (citation omitted). In evaluating a claim of ineffective assistance of counsel,

> Judicial scrutiny of counsel's performance must be highly deferential, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional representation.... Counsel is also presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Zant v. *Moon*, 264 Ga. 93, 97, U.S. *cert. denied* (1994) (citations omitted).

50. Based on a careful review of the trial record, the evidence introduced during the trial of the habeas petition, the arguments of counsel and the legal authorities cited here, the court finds that trial counsel committed serious errors which, when taken together, prejudiced the defense and that Christenson was thereby denied a trial whose result is reliable as to the sentence and accordingly grants the petition for writ of habeas corpus as to the sentence of death. Trial counsels' performance was cumulatively deficient in terms of investigation and preparation of the defense and in presentation of evidence and argument in mitigation. The court

finds that absent these errors it is likely that the result of the proceeding would have been different and the jury would not have voted to recommend the death penalty. The court will discuss herein several of the most significant errors of trial counsel which in the aggregate deprived Christenson of his constitutionally protected right to a fair trial.

B. Skill and Knowledge

51. First, the court finds that trial counsel failed to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* v. *Washington*, 466 U.S. 668, 688 (1994). Bunn, with limited felony trial experience and no experience with even noncapital murder trials, was unprepared to offer reasonably effective assistance in a death penalty case. Even though trial counsel concluded that success at the guilt/innocence phase was unlikely and recognized that Kirby had the greater experience, they nonetheless assigned primary responsibility for the more important penalty phase to Bunn. *See* ¶ 5. Additionally, based on a detailed review of the trial transcript and the court's own observation of Bunn's courtroom demeanor during the habeas hearing, the court finds that Bunn's soft-spoken and tentative manner and inexperience afforded the prosecutor excessive latitude in the penalty phase.

C. Performance During the Pretrial Phase

52. *Claims.* In ¶¶ 35-48 of the Amended Complaint, Christenson alleged that his trial attorneys fell short of the standard of minimally effective representation at the pretrial stage by failing adequately to investigate the state's claim against him, by failing sufficiently to develop evidence for the need for funds to retain an investigator, by failing to inspect the district attorney's file until the eve of trial, by failing to test the physical evidence, by failing adequately to prepare for and argue pre-trial motions, by failing to marshal adequate evidence to secure funds for an independent psychiatrist, by failing to ensure that the court's order for psychiatric examination was followed, by failing to obtain expert assistance, by failing to seek funds for the attendance of witnesses, by failing to challenge the constitutionality of Georgia's death penalty statute and the Unified

Appeal Procedure, by failing to challenge the prosecutor's intention to introduce allegedly incriminating statements, by failing to seek the recusal of the trial judge who would be identified as the prosecutor in an earlier criminal matter involving Christenson, by failing to seek the recusal of the prosecutor, and by failing to secure a change in venue.

53. When appointed to the case, trial counsel were presented with these circumstances: a very young defendant with a history of juvenile property offenses and in-patient mental health treatment, a victim killed by multiple gunshot wounds, and several statements given by the defendant which (if admitted) firmly established that he alone caused the victim's death during the course of an armed robbery (a clear-cut statutory aggravating factor). *See* ¶¶ 7, 12. Trial counsel started out with several appropriate areas of investigation, including moving for funds for the assistance of a psychiatric expert and an investigator to interview witnesses about the facts surrounding the case as well as to develop mitigation evidence. *See* ¶ 6. Approximately six months passed during which defense counsel engaged in little active investigation of the case beyond talking to Christenson himself and his father. *See* ¶ 10. Although these two lawyers had little control over whether the judge would grant them the requested help in preparing the case for trial, the court finds that the absence of such important preparation tools rendered them ineffective in meeting the state's case. When the motions for funds for assistance were denied, less than six weeks before trial, defense counsel abandoned any inquiry into any mental health issues and delayed or failed to speak with witnesses. *See* ¶ 9.

Given the circumstances, including the likelihood that at least one of Christenson's confessions would be admitted, a reasonably effective lawyer would vigorously investigate any possible avenue of persuading the jury that, even if the crime did satisfy the elements of murder, the defendant was not legally responsible for his actions. Furthermore, even if evidence of mental illness did not persuade the jury to acquit during the guilt/innocence phase, it would be relevant to their deliberations regarding sentence. In the mitigation phase of his death penalty trial, Christenson had the right to present evidence as to his mental condition, his mental history, his social history, his

neurological condition, the fact that he was under the influence of drugs at the time of the occurrence, and any and all other mitigating factors which go to his ability to form intent, to realize the nature and consequences of his actions, his ability to control himself, and his ability to deal with reality. *Bright* v. *State*, 265 Ga. 265, U.S. *cert. denied*, (1995). Inadequate investigation of the factual basis for defenses and facts in mitigation can constitute "inadequate representation." *Zant* v. *Hamilton*, 251 Ga. 553 (1983) (counsel ineffective for failing to investigate state's witnesses, family members, deceased's reputation for violence, co-defendant's deal with the state, and other matters); *Hawes* v. *State*, 240 Ga. 327, 329 (1977); *House* v. *Balkcom*, 725 F.2d 608, 617-18 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984) ("when a lawyer fails to conduct a substantial investigation into any of his client's plausible lines of defense, the lawyer has failed to render effective assistance of counsel"); *Jowers* v. *State*, 260 Ga. 459 (1990) (where sole defense (suicide) was supported by state's scientific evidence, ineffective not to investigate the results and to allow unrebutted argument contrary to conclusions). This rule flows from plain common sense: only if counsel has conducted a "sufficient investigation" can they hope to make a reasonable "strategic" choice among possible defenses.

The requirement of adequate investigation and analysis has been applied to mental health issues. In *Curry* v. *Zant*, 258 Ga. 527, 528 (1988), the report of the court-ordered evaluation of the defendant by a state psychiatrist was "not favorable to the defense" because the psychiatrist found that the defendant might be malingering and manipulating the staff. The court granted habeas relief on the grounds that trial counsel was ineffective for failing to obtain an independent psychiatric evaluation of the defendant because there was compelling evidence that he suffered from intellectual deficiency, major psychiatric illness and an organic brain syndrome. Id. at 529-30. *See also Zant* v. *Pitts*, 263 Ga. 529, 529 (1993) (counsel ineffective for failing to pursue a possible verdict of guilty but mentally retarded where they had the results of mental examination by two experts which showed that defendant had an IQ of 70). *Compare Zant* v. *Moon*, 264 Ga. 93(2), U.S. *cert. denied* (1994) (trial counsel was not ineffective for failure to provide

background information to psychiatric experts and for decision not to introduce evidence of psychiatric diagnosis where under the circumstances these were reasonable strategic decisions); *Hammond* v. *State*, 264 Ga. 61(4) (1995) (trial counsel was not ineffective for failure to investigate and present evidence regarding mental health where it was only speculative that additional investigation or evidence would have benefitted his case or changed the outcome).

Evidence available to trial counsel from the Bradley Center records and the evaluation by the state psychologist should have suggested to counsel that they should consider marshaling evidence that Christenson was mentally ill. Trial counsel testified that one of their main strategies was using evidence of mental illness to "confuse the issues," (Tr. 770) yet they did not understand the diagnoses and mental health evaluations of Christenson available to them in the Bradley Center records and the report of the state psychologist and failed to take adequate steps to improve their understanding. (*See* Tr. 457-58, 469-70, 480.) They failed to analyze the Bradley Center materials adequately, did not interview Bradley Center personnel, and did not adequately explore using the report of the court-ordered mental health evaluation or the testimony of the state psychologist, Dr. Karen Bailey-Smith. (Tr. 459-90). In seeking expert assistance, counsel failed to make a convincing case for funds for an independent expert and when funds were denied, counsel failed to seek other ways of securing expert assistance and then abandoned the mental health issues and went "in another direction." (Tr. 604-06.) They assumed that evidence of Christenson's drug use would not "go over very well in Harris County" because the jury was likely to have conservative values. (Tr. 296.) Defense counsel apparently overlooked or discounted the references to Christenson's serious and chronic alcohol abuse, impaired cognitive functioning, poor reality testing and lack of impulse control. *See* ¶ 9.

Additional evidence introduced at the habeas trial showed that evidence could have been developed to support a theory that Christenson had a number of long-standing serious psychological and psychiatric problems which caused obsessive stealing and lack of impulse control and essentially combined to create an irresistible

compulsion to steal the victim's stereo-equipped truck and that Christenson's capacity to direct his own behavior was impaired. *See* ¶ 20. By giving the jury an alternative to the picture painted by the prosecutor that the killing was the result of cool, rational calculation, defense counsel might have persuaded the jury that Christenson deserved mercy, rather than the death penalty. The defense could have also argued that Christenson was capable of being rehabilitated so his execution was not the only way to protect society from his future misconduct.

The court finds that defense counsel failed to ensure that they adequately understood available materials before making the decision to abandon further investigation and evaluation of evidence of mental illness. Accordingly, their decision that there was nothing in Christenson's family background or psychological makeup which would help the case in mitigation cannot be defended as a reasoned strategic decision. *Zant* v. *Hamilton*, 251 Ga. 553, 554-55(3) (1983), U.S. *cert. denied* (1984). Although a verdict of guilty but mentally ill would not have precluded the imposition of the death penalty, *Spraggins* v. *State*, 258 Ga. 32 (1988), the court finds a reasonable probability that the jury would have recommended life if they had received substantial evidence of Christenson's psychiatric history and mental condition at the time of the crime. Based on these authorities and the facts cited above, the court finds that counsel's performance was deficient in summarily abandoning the mental health issues and that such failure, taken together with counsel's other errors, prejudiced the defense.

D. Performance During the Guilt/Innocence Phase

54. *Claims*. In ¶¶ 52-61, Christenson alleged that his trial attorneys were ineffective during the guilt/innocence phase of the trial by failing to present a coherent defense theory and to prove facts asserted in argument, by failing adequately to investigate the case, by failing adequately to develop and present exculpatory evidence, by failing to provide support for a request that the jury be instructed as to lesser offenses, by failing adequately to prepare witnesses called on behalf of the defense, by failing appropriately to interview defense witnesses, by failing to meet the state's case-in-

chief (for example, by adequately cross-examining prosecution witnesses), by failing to object to certain conduct by the prosecutor, by failing to object to the introduction of certain evidence, by making errors of fact during argument, and by making certain comments.

55. *Lesser Included Offense Charge.* Christenson claimed that trial counsel were ineffective for failing to provide support for a request that the jury be instructed as to lesser offenses, particularly voluntary manslaughter. Specifically, Christenson argued that defense counsel failed to gather and present all available evidence in support of the factual scenario that the first shot was fired while he and Oliver struggled for control of the gun. The court finds that the overwhelming and largely unrebutted evidence admitted during the guilt/innocence phase of the trial depicted a shooting which began with an unprovoked armed robbery of the victim. Where a person is subjected to an unprovoked attack and struggles or fights with his attacker in an attempt to repel the attack, the attacker is not entitled to a charge on voluntary manslaughter on a theory of provocation or mutual combat. In *Joyner* v. *State*, 208 Ga. 435 (1951), two men argued in a store, one left and re-entered the store after several minutes with a pistol and without speaking immediately began shooting at the victim. The trial court omitted to charge the jury (without request) concerning voluntary manslaughter and mutual combat. The Supreme Court of Georgia affirmed and held as follows:

> Mutual combat exists where there is a fight with dangerous or deadly weapons, and when both parties are at fault and are *mutually willing to fight because of a sudden quarrel.* "The essential ingredient, mutual intent, in order to constitute mutual combat, must be a willingness, a readiness, and an intention upon the part of both parties to fight. Reluctance, or *fighting to repel an unprovoked attack, is self-defense* and is authorized by the law, and should not be confused with mutual combat.

Id. at 439-40(4) (citations omitted; emphasis added). Similarly, in *Horton* v. *State*, 249 Ga. 871 (1982), where the defendant while

burglarizing an apartment was interrupted by an armed man and shot him, the trial court declined to give a requested charge on voluntary manslaughter. The Georgia Supreme Court affirmed the death sentence, finding not even "slight evidence" to the requested charge, and stated, "[b]eing discovered during the commission of a burglary is not as a matter of law such provocation as would require a charge on voluntary manslaughter." Id. at 872. *See also Fields* v. *State*, 211 Ga. 335, 338(5) (1955) (where a detainee seized an officer's gun, intending to escape, the two struggled for the gun, and the gun discharged and killed the officer, defendant was not entitled to a charge on voluntary manslaughter as related to mutual combat or mutual intention to fight). In the case at bar, Oliver's unsuccessful attempt to repel the threat of deadly force cannot be considered "a sudden quarrel" or a "mutual combat." Although trial counsel protected the issue by requesting the charge (3/23/90 Tr. 42-43), it is ludicrous to assume that any quantity or quality of evidence that Christenson and Oliver struggled for control of the gun *after* Christenson drew the gun and aimed it at Oliver to rob him of his truck could have persuaded the trial judge to give a charge on voluntary manslaughter based on provocation or mutual combat. Accordingly, trial counsel's performance was not deficient in making a strategic choice not to waste limited resources in seeking a voluntary manslaughter charge and to concentrate on other issues. Furthermore, because the charge was not warranted on the facts, any deficiency in counsel's performance in seeking the charge could not have prejudiced the defense.

56. *Defense Evidence and Argument.* During the guilt/innocence phase in this case, defense counsel attempted to divert attention from Christenson's bad deeds by suggesting that "others were involved" and that Oliver was killed when Christenson attempted to trade guns for drugs and Oliver made a sexual advance to him. *See* ¶ 13. The court finds that trial counsel's performance was deficient in that both of these propositions were supported with little or no evidence and weak, unpersuasive arguments. Vague implications ending with "come to what conclusions you may" (3/23/90 Tr. 84) cannot be expected to overcome such persuasive evidence as three separate confessions by the defendant. In addition, the court finds that

counsel's performance was deficient in attempting to tar Oliver's character because the jury was likely to be offended by the defense's unsupported aspersions against the character of the deceased and therefore less inclined toward mercy in their penalty deliberations. The court finds as a matter of law that these deficiencies in counsel's performance did not prejudice the defendant as to the determination of guilt but that the effect of the deficient performance carried over to the jury's deliberations during the penalty phase and rendered the resulting death sentence unreliable.

E. Performance During The Sentencing Phase

57. *Claims*. In ¶¶ 62-77, Christenson alleged that his trial attorneys were ineffective during the sentencing phase by ignoring mitigating evidence regarding his mental and psychological problems, by failing adequately to investigate his family and upbringing, by presenting a false portrayal of his personal history, psychological profile and family life, by failing to articulate to the jury the significance of the exhibits introduced in mitigation, by failing to call certain mitigation witnesses, by failing adequately to prepare witnesses who testified in mitigation, by failing to object to portions of the prosecutor's cross-examination of mitigation witnesses, by failing to rehabilitate mitigation witnesses after cross-examination, by failing to object to the prosecutor's questions and comments about a number of matters (prior criminal offenses, victim-impact evidence, prison overcrowding, the deterrent value of executing Christenson, the prosecutor's own views on Christenson's culpability, religion, and the possibility of parole), by failing to request a limiting instruction on the use of evidence of prior offenses, by failing to investigate the circumstances of Christenson's prior offenses, by failing to present evidence relating to Christenson's adjustment to prison life, by failing to ask the jury for mercy for him, by telling the jury that their decision had to be unanimous, by failing to object to the "Report of the Trial Judge," and by failing to object to certain jury instructions.

58. Argument Regarding Unanimous Verdict. During closing argument, defense counsel made the following statement:

> When you go into the jury room[,] your choice must be unanimous. Whatever decision you bring must be unanimous. The judge is going to charge you on that. So, each one of you holds Scott Christenson's life in your hands.

(3/24/90 Tr. 192.) During the habeas hearing, defense counsel readily conceded that the statement of law was not correct and "that was a train of thought [and he] got off the tracks." (Tr. 675-76.) The court finds that counsel did not misstate the law: as the judge correctly charged the jury, "whatever your verdict is as to penalty, it must be unanimous." (3/24/90 Tr. 203.) In *Legare* v. *State*, 250 Ga. 875 (1983), the Georgia Supreme Court noted that:

> [Georgia's] death penalty statute provides that if the jury considering the death penalty cannot reach unanimity as to whether to recommend life or death, the court shall sentence the defendant to life imprisonment, and no retrial is permissible.
>
> * * *
>
> While the trial court is not required to instruct the jury that lack of unanimity forecloses imposition of the death penalty it is error to give a charge that is contrary to this rule of law.

Id. at 876-77(1) (citations omitted). Thus, the jury's deliberations could have concluded one of three ways: 1) *a unanimous verdict* recommending a death sentence; 2) a *unanimous verdict* recommending a life sentence; or 3) a lack of a unanimous verdict *(i.e.,* a hung jury) in which case Georgia law clearly would require the trial court to sentence the defendant to life imprisonment. Georgia law, however, does not require the trial judge to instruct the jury as to the effect of their failure to reach a verdict, and in fact disapproves of it. *Romine* v. *State*, 256 Ga. 521, 525-28 (1986), U.S. *cert. denied* (1987). Therefore, the court's charge was not error, and, despite trial counsel's concession, the defense's closing argument did not misstate the law. Accordingly, the court finds that counsel's performance was not deficient in regard to the argument on unanimity.

59. *Mitigation Evidence.* The court finds, however, that defense counsel committed other serious errors during the penalty phase. At the penalty phase, a reasonably effective lawyer would have one goal: to persuade the jury that the defendant did not deserve to pay the ultimate penalty and that his life should be spared. In this case, trial counsel chose "to go in the more positive direction" and attempted to humanize Christenson by showing that he came from a good family who cared about him and that he had never been violent before. Defense counsel acknowledged at the habeas corpus hearing, however, that to persuade the jury that Christenson, was redeemable and deserving of mercy, they needed to explain to the jury why Christenson had engaged in the bad behavior the prosecutor would emphasize: the crimes for which he had just been convicted, as well as his prior offenses and drug use. (Tr. 600-06.)

The court finds that trial counsel's performance was deficient in preparing and presenting witnesses' testimony in support of their mitigation argument. Several witnesses, *e.g.*, Christenson's former baseball coaches, had had little or no contact with Christenson in the several years before Oliver's death and knew Christenson primarily as a young boy. Additionally, counsel failed to prepare the witnesses for cross-examination as to Christenson's prior bad acts; several witnesses had to respond over and over that they did not know Christenson had committed a particular crime which undermined the credibility of their endorsement of Christenson's character. (*See* 3/23/90 Tr. 204-07; 3/24/90 Tr. 32-35, 41-44, 125.) Furthermore, each witness' testimony was very brief and gave the jury little chance to form an impression of the witness or the witness' feelings for Christenson. Accordingly, the witnesses' testimony gave scant support to counsel's attempt to humanize Christenson.

60. *Mitigation Argument.* The court further finds that trial counsel's performance was deficient in the final argument to the jury. By admittedly breaking their promise to explain how Christenson came to kill Oliver, emphasizing that even *his own lawyers* were baffled, trial counsel did nothing to counter the prosecution's outraged argument that the murder was completely deliberate and cold-hearted and therefore supremely deserving of the

ultimate penalty. Defense counsel painted a picture of a loving and well-loved child blessed with considerable athletic ability and artistic talent, but failed to offer any meaningful explanation for why Christenson as a young man flouted his parents' values and chose a life of drug abuse and theft. By failing to develop any coherent explanation for why a good person committed such bad acts, defense counsel permitted the prosecutor to turn the positive mitigation evidence *against* Christenson and argue that because Christenson had grown up with "all the opportunities" (3/24/90 Tr. 183) he was even *more* culpable and deserving of death. Finally, by frequently reminding the jury that Christenson had committed a "horrible crime" for which there were "no excuses" yet expressly disavowing any request for mercy for him, defense counsel distanced themselves from their client and sabotaged their argument that he could be redeemed and rehabilitated. *See* ¶¶ 15, 16. Accordingly, trial counsel's performance was deficient in failing to present a closing argument likely to persuade a death-qualified jury[18] that a life sentence would be sufficient punishment under the circumstances. The court finds that defense counsel's deficient performance in this regard, taken together with counsel's other errors, prejudiced the defense.

F. Conclusion

61. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984). The totality of representation must be examined in determining the effectiveness or ineffectiveness of counsel. *Hicks* v. *State*, 169 Ga. App. 542, 542 (1984); *Dansby* v. *State*, 165 Ga. App. 41, 43 (1983). The seriousness of the charge is also a factor that must be considered when looking at an ineffective assistance of counsel claim. *House* v. *Balkcom*, 725 F.2d 608, 615 (11th Cir. 1984). Where the petitioner's life hangs in the balance, the reviewing court must "pay the utmost attention to rights guaranteed under the Constitutions of the United States and the State of

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[18] *See Witherspoon* v. *Illinois*, 391 U.S. 510 (1968).

Georgia." *Ross* v. *Kemp*, 260 Ga. 312, 312 (1990) (citing *House* v. *Balkcom*, 725 F.2d 608, 615 (11th Cir. 1984)). The court has carefully reviewed the trial record, the evidence adduced at the evidentiary hearing, the arguments of counsel, and the law applicable to Christenson's claims. The court finds that in the totality of this case Christenson has overcome the strong presumption that his trial counsel rendered adequate assistance and has shown that his trial counsel's performance was deficient and that the deficient performance prejudiced his defense. The court finds that there is a reasonable probability that, but for the cumulative effect of counsel's unprofessional errors, the result of the sentencing proceeding would have been different and the jury would not have recommended death. Accordingly, the petitioner Christenson has carried his burden of proof on both prongs of the *Strickland* test as to whether his trial attorneys provided ineffective assistance of counsel during his trial for murder and armed robbery.

DISPOSITION

Based upon the above findings of fact and conclusions of law, this court hereby orders that the writ of habeas corpus is **GRANTED** as to the sentence of death, and the Petitioner's sentence under the indictment in the Superior Court of Harris County, criminal action number 89-CR-7525, is hereby vacated. The clerk of the Superior Court of Butts County is directed to serve a copy of this Order on the Petitioner, Petitioner's counsel in this action, the Respondent, the Attorney General, the District Attorney of the Chattahoochee Circuit and the additional parties listed below.

IT IS SO ORDERED this 10th day of April, 1997.

_____

WILLIAM A. FOSTER, III
Judge of the Superior Court

Copies to be served on:

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Relevant portions of the Transcript of the Hearing on *State of Georgia* v. *Scott Christenson*, Indictment No. 89-CR-7525, before the Hon. William J. Smith, Superior Court of Harris County, Georgia [MM/DD/YY Tr. [page number]].

3/21/90 Tr. 89-90

Mr. Kirby: In fact, most of the evidence will be about one mistake after another that was made by my client, Scott Christenson. Let me tell you about these mistakes.

The first mistake, and I'm telling you that it's the first mistake he ever made in his life but the first mistake that is directly relevant to this case are those days between when this event occurred, which I believe was on Wednesday, not Thursday, July 6th and the time that he came back to Columbus, several days later.

The first mistake, he used drugs and he bought some of the drugs that he used from Albert Oliver.

The second mistake, he stole two pistols from his father and he intended to use those pistols to trade for drugs.

The third mistake, he tried to trade the guns to Albert Oliver for the drugs, but Albert Oliver decided that he didn't want the drugs, he wanted sex, from him (indicating).

The fourth mistake, the defendant wouldn't get out of Albert Oliver's truck when Albert Oliver wanted him to. He

fought with Albert Oliver and Albert Oliver
got shot once in the leg.

3/23/90 Tr. 52-53

Mr. Kirby: I'd like to apologize to you for one other thing. When I came before you the first time and made my opening remarks, I told you that I thought that the evidence would answer most of your questions, would tell you most of the reasons that these two families ended up together in this courtroom. I was incorrect. Fortunately or unfortunately as the case may be, most of the questions were not answered. I submit to you that we don't know most of the reasons why these two families ended up in this courtroom today.

3/23/90 Tr. 82-85

Mr. Kirby: The defense introduced four things into evidence, four items into evidence. You may recall them. I passed them around on a piece of paper. They were a Sneaky Pete Condom, still in the wrapper, Sneak Pete brand name. Two other condom wrapper boxes that contained these items and a third plastic wrapper that had once contained a condom but the condom apparently had been taken out and used. All these items, as you recall, were recovered from the truck that the deceased owned.

It's difficult and I don't think anyone would take any pleasure in attempting to besmirch the character of the deceased and he is not able to defend himself verbally before you. When the defendant is on trial for his life one must do, one must present evidence that is available. I didn't find that evidence. The defendant didn't find that evidence. Agent Rothwell did. Agent Rothwell inventoried the items in the truck and he found those things.
The defense learned of them by reading the inventory.

You'll recall also that Agent Rothwell inventoried or searched or looked at the deceased's apartment and he testified that he found a box that had been the box apparently of a number of Sneak Pete Condoms. I submit to you, ladies and gentlemen, these were the deceased's condoms.

We've heard testimony that the deceased was a 31-year-old man. He was unmarried. He lived in an apartment. He had an apartment of his own. I don't want to dwell on this but ask yourselves, why would a 31-year old man who is unmarried and had his own apartment be using condoms in his truck. They were apparently used there. He had the two empty boxes from them and the empty wrapper from one and consider that for what it's worth and ask yourself what was going on. Think of that and reflect back to the story of driving up Hamilton Road and Gray Rock Road and turning around and coming down Woolridge Road and so on. That circuitous route. I submit to you ladies and gentlemen is what you're hearing is is [sic] a description of a person driving a truck that's looking for a secluded spot. Driving until he finds a secluded spot. Not someone that's being given directions by a virtually unknown passenger to some nameless friend's house. That's the answer. Consider that and come to what conclusions you may.

I submit the the [sic] facts of the case are more in concert with a person driving, looking for a secluded spot then a person just giving a friend or an acquaintance a ride to an unknown friend's house. Think about that.

3/23/90 Tr. 86-87

Mr. Kirby: Apparently he told his brother about this and the next witness, Brian Grier, who you may recall was the 17 year old student at Columbus High, the eleventh grader. He said he had known Bert for five or six years and that Bert was his best friend.

3/23/90 Tr. 110

Mr. Pullen: You want to talk about what was said in an opening statement, and there's no ambiguity about this. Mr. Kirby accused a dead man, who certainly cannot speak for himself, of being a homosexual and a drug dealer. He, once he did that, while there was no burden on him, should have undertaken to prove that.

* * *

3/23/90 Tr. 111

Mr. Pullen: I submit to have anybody's character attacked in that fashion on the basis of that little bit of evidence, is absolutely unconscionable, totally unconscionable.

3/22/90 Tr. 202-04

Mr. Pullen: Your Honor, we have transcripts of this video tape also and we would like to distribute them.

The Court: Pass them out.

Mr. Kirby: Your Honor, I've had an opportunity to see the other transcripts prior to this, but I have not had an opportunity to see this transcript. It's freshly wrote. I'd like to have an opportunity to read it.

The Court: Did you know this part of it was coming next?

Mr. Kirby: It just arrived here today, the transcript.

Mr. Pullen: We had the copies made today, Your Honor. We had given them, of course, a copy of the video tape months ago

The Court: Go ahead and read it and be passing it out. Don't open or read this until the Court indicates. Just receive it and hold it.

Mr. Kirby: Your Honor, of course, I haven't had the opportunity to compare this as I was listening to the tape but it's my recollection a large amount was inaudible. I see a number of inaudible statements in this. It's just difficult for me to have any credit, for me to feel confident in this, not having had an opportunity to compare the two as I did the others. For that reason I--

The Court: You did have an opportunity and did review the tape.

Mr. Kirby: I've seen the tape itself. I just haven't had an opportunity to compare this--

The Court: You can sit around where you can see the tape and follow the transcript. If you have an objection lodge it at that time.

You want to come around here.

Mr. Kirby: I've got to make one note here.

Mr. Pullen: Would you play the tape please.

Agent Rothwell: I'll warm the T.V. up first to make sure.

Relevant portions of the Transcript of Proceedings Heard before the Hon. William A. Foster, III, Superior Court of Butts County, Georgia, June 1996 [Hab. Tr. [page number]].

Hab. Tr. 874

Mr. Edelman: Q. Okay. So evidence, competent evidence, what competent evidence did you have that Albert L. Oliver, III had ever been involved with illicit drugs?

Mr. Kirby: A. Only what the defendant told me, which I could have used, but chose not to.

Q. Okay. Did you think that if you made a statement to the jury, but you never offered any proof you might prejudge the jury or cause the jury to prejudge your case?

Ms. Katz: Objection. Calls for speculation.

The Court: Overruled.

A. That's possible. I didn't consider it a great problem.

Q. Okay. And it is a fact, is it not, sir, that you told the jury that Mr. Oliver used drugs -- I'm sorry, Mr. Christenson used drugs, and he bought some of the drugs that he used from Albert Oliver?

A. I believe that was part of my opening remarks, yes.

Hab. Tr. 789

Ms. Katz: Q. Did you talk with any of the teenagers who were friendly with the victim?

Mr. Kirby: A. A number of them.

Q. Did they give you any useful information?

A. As I said, I didn't find any use of drugs, any reference to drugs with the victim. There seemed to be alcohol -- alcohol in that vehicle and his nice home with a modus operandi. I discovered the information about the insurance I had spoken of previously, but I wasn't able to develop that into anything of any particular use.

Hab. Tr. 873-74

Mr. Edelman: Q. You told us on direct testimony this morning that you found no evidence of Mr. Oliver's involvement with drugs. Do you recall that testimony, sir?

Mr. Kirby: A. Other than, of course, what the defendant had told me. But I found no corroboration of this from anyone else.

Q. Okay. So evidence, competent evidence, what competent evidence did you have that Albert L. Oliver, III had ever been involved with illicit drugs?

A. Only what the defendant told me, which I could have used, but chose not to.

Hab. Tr. 510

Mr. Lacovara: Q. Are you aware that the distribution of drugs is a crime in the State of Georgia?

Mr. Bunn: A. I am.

Q. Did you have any evidence prior to the time of trial that Bert Oliver had been a drug dealer?

A. No.

Hab. Tr. 261

Ms. Katz: Q. Now, did you investigate the victim at all; his background or —

Mr. Bunn: A. Yes, we did.

Q. And what did you come up with?

A. A lot of rumors. I believe he had graduated from Southern Mississippi and had been working for a construction firm in Columbus, Freeman and Associates, was a project manager for them, mainly did commercial construction.

Hab. Tr. 763

Ms. Katz: Q. And you said over a period of time petitioner kept changing his story. Was there any change in his story right before trial?

Mr. Kirby: A. As I recall, the evening before or afternoon before the trial actually began, the story changed.

Q. What did it change to?

A. I believe that was the story about the black man being involved.

Q. At that point, what were you thinking would be the defense strategy?

A. At that point, I had pretty much concluded that it would be foolish to put the defendant on the stand.

Q. Did you intend to put him on the stand prior to that?

A. I had hoped to, I'll put it that way. I was going to have to see how things developed during the trial, but it was my intent, prior to that last story, to put him on the stand during the guilt innocence phase.

Hab. Tr. 874-75

Mr. Edelman: Q. Okay. And it is a fact, is it not, sir, that you told the jury that Mr. Oliver used drugs -- I'm sorry, Mr. Christenson used drugs, and he bought some of the drugs that he used from Albert Oliver?

Mr. Kirby: A. I believe that was part of my opening remarks, yes.

Q. Okay. And for the record, that is in the transcript of the March 21, 1990 proceedings, at page 89, line 21.

You understood, didn't you, sir, at the time you made that statement, that the sale of those drugs is a crime under Georgia law?

A. Yes.

Q. What evidence did you offer the jury to support that statement?

A. Subsequent to that, none.

Hab. Tr. 252-53

Ms. Katz: Q. Did you ask him, for example -- was one of the rumors that the victim was homosexual?

Mr. Bunn: A. Yes. And we -- Bill confronted him about that. I was there when he asked him about that, and at that point Scott denied that, denied that there was any involvement like that.

Hab. Tr. 257-8

Ms. Katz: Q. I know you said there was some rumors that the victim was homosexual?

Mr. Bunn: A. Bisexual.

Q. Bisexual. Did you have anything to substantiate that; did you attempt to substantiate that?

A. I had my investigator, who does work for me, try to run down some of those reports.

Q. You had your own investigator?

Mr. Lacovara: Your Honor, I couldn't hear that last response.

The Court: I'm afraid I didn't either.

The Witness: Okay.

The Court: Can you speak a little louder? With the air conditioner fan going, it is difficult to hear.

A. I said I had my -- the man who does investigative work for me try to run -- try to run down some of those rumors to see what he could find out. I asked him to see what he could find out.

Q. Was he able to find anything out?

A. Nothing other than rumors. There were a lot rumors.

Q. Did the investigator work on any other information?

A. That investigator did not, not for me.

Hab. Tr. 504-06

Mr. Lacovara: Q. And over that two-week period, did he develop any evidence at all that Mr. Oliver was homosexual or bisexual?

Mr. Bunn: A. No. He found rumors. That was it.

Q. Found rumors. There was nothing you could substantiate, nothing you could put on as evidence?

A. That's correct.

Q. You conveyed the results of Mr. Anderson's investigation to Mr. Kirby prior to the beginning of trial?

A. Yes.

Q. You expected that he would take that into account?

A. Yes, sir.

Q. Were you aware of any evidence that showed that Mr. Oliver -- any evidence that you could put on at all, that would tend to show that Mr. Oliver was homosexual or bisexual?

A. Well, I mean, he seemed to like to hang around with young men and young women, so I think the better characterization would have been at least bisexual and not homosexual.

Q. The question is whether there was any evidence?

A. Well, I mean, there was evidence that he hung around young people.

Q. Did you have any -- did you put any of that evidence in at trial?

A. There was evidence of that in the trial.

Q. Was there any evidence that was not objected to at trial?

A. I don't recall.

Q. Do you consider that competent evidence that someone is homosexual or bisexual if he hangs around with other men?

A. No.

Q. So to the best of your knowledge, there was no evidence at trial to support the proposition that Mr. Oliver was homosexual or bisexual; is that correct?

A. There was no solid evidence.

Q. Was there any evidence at all at the trial that Mr. Christenson -- Mr. Oliver, excuse me, was homosexual or bisexual?

A. No.

Q. Were you aware of any evidence prior to Mr. Kirby delivering the opening statement that began the trial to that effect?

A. We knew of the rumors, and we knew what it appeared to be, that he liked to hang around with younger --

Q. Do you consider rumors evidence?

A. Not normally.

Q. Ever?

A. Well, I mean, if we can get it in. If it helps us, we consider it evidence.

Q. Did you attempt to get it in this trial?

A. I didn't handle that portion of the trial.

Q. To your knowledge, did Mr. Kirby attempt to get it in?

A. He had some evidence. I don't recall.

Q. Do you recall whether he attempted to get it in?

A. I don't recall.

Hab. Tr. 510

Mr. Lacovara: Q. Did you have any evidence that Bert Oliver -- we've covered already, I believe, and established that you had no evidence that Bert Oliver was a homosexual or engaged in homosexual activity; correct?

Mr. Bunn: A. Correct.

Hab. Tr. 875-77

Mr. Edelman: You understood, didn't you, sir, at the time you made that statement, that the sale of those drugs is a crime under Georgia law?

Mr. Kirby: A. Yes.

Q. What evidence did you offer the jury to support that statement?

A. Subsequent to that, none.

Q. Okay. And at the time that you made that statement to the jury, you had in your possession, did you not, a transcript of Mr. Christenson's audio-taped statement to Agent Rothwell of the Georgia Bureau of Investigation and Detective Ricky Boren that Mr. Christenson's activities with respect to Mr. Oliver's truck did not involve drugs?

A. I don't recall that particular detail, but that could well be true.

Q. Well, why don't you look, sir, please, at page 177 of the transcript of March 22, 1990?

A. Is that before me somewhere?

Q. It certainly is. It is in one of the binders, Mr. Kirby.

A. March 22nd?

Q. Yes, sir. Page 177, line six.

A. "Detective Boren: Okay, a, you also mentioned to police officers or to other investigators prior to this interview drugs. Was there any drugs involved in this transaction between you and Bert? Mr. Christenson: No."

Do you want me to go any further?

Q. That transcript was presented to the jury; correct; in the form of --

A. I assume it was.

Q. Well, you were there, weren't you, sir?

A. I was, obviously. And I just don't recall that particular thing, but I assume it was presented to the jury.

Q. Okay, sir. Now, you also told the jury that Mr. Oliver tried to obtain sex from Mr. Christenson; is that right?

A. I believe so.

Q. Well, why don't you look at the transcript of March 21, 1990, page 90, line three.

A. "The third mistake, he tried to trade guns to Albert Oliver for drugs. But Albert Oliver decided he didn't want drugs, he wanted sex from him." Him indicating the defendant.

Q. Right. You were aware at the time you made that assertion to the jury that Mr. Oliver wanted to obtain sex from Mr. Christenson, that Georgia has a statute that makes it a crime to engage in homosexual sodomy; correct?

A. If there is the crime of sodomy, that's correct.

Q. And that would apply to that kind of conduct; correct?

A. It depends upon what specifically sex meant, but there are several ways to commit the crime of sodomy in a homosexual context, yes.

Q. Well, without causing you to have to be graphic about it, Bowers v. Hardwick, have you ever heard of that case, sir?

A. Yes.

Q. Okay. Do you have in mind what its holding is and what the factual circumstances of that were?

A. Yes.

Q. All right.

Hab. Tr. 510

Mr. Lacovara: Q. You testified also that you considered the juries in Harris County to be very conservative; correct?

Mr. Bunn: A. I did.

Hab. Tr. 719-20

Ms. Katz: Q. You testified that the jury that you had in this case reflected Republican Party values?

Mr. Kirby: A. Yes, sir, I did say that.

Q. Your characterization of Republican Party values, do they condone -- Republicans condone homosexuality?

A. They say they don't.

Q. Are Republican Party values, as you used the term, consistent with --

A. Actually, that is a misnomer. I said what Republicans say their values are.

Q. Well, even taking that characterization, are those professed values consistent with condoning homosexuality?

A. No.

Q. Consistent with condoning drug use?

A. No.

Q. And I take it you did not mean to suggest that merely because -- excuse me, because the jury embodied Republican Party values that you didn't think that they would fairly consider the evidence you had put on; isn't that true?

A. No. I thought they were good people. I thought we had good people on our jury.

Hab. Tr. 511

Mr. Lacovara: Q. Do you recall that Mr. Kirby stood up in front of this Harris County jury, this conservative jury, and said that Bert Oliver was both homosexual and a drug dealer, and that this crime had all been about drugs and sex; do you remember that?

Mr. Kirby: A. Y[illegible]

Q. Do you remember the jury reacting to that?

A. Actually, that was probably the best part of the trial for us. That was the only time we seemed to get anybody's attention. I don't recall how they reacted to it, but it made for --

Q. So you thought the jury was with you at this point?

A. Well, they were listening.

Q. They were intrigued.

No. 98-33

In The

Supreme Court of the United States

October Term, 1997

SCOTT LYNN CHRISTENSON,

Petitioner,

v.

TONY TURPIN, Warden,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

I.

Should this Court decline to grant certiorari to review a fact-specific application of the settled precedent of this Court to the particular circumstances of Petitioner's case?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Scott Lynn Christenson, was indicted in the Superior Court of Harris County, Georgia on September 11, 1989 for the July 6, 1989 armed robbery and murder of Albert L. Oliver III. Petitioner was represented at trial by attorneys William L. Kirby II and Richard A. Bunn. Petitioner was tried before a jury in a bifurcated trial conducted March 19, 1990 through March 24, 1990 and was convicted of murder and armed robbery. Petitioner was sentenced to death for murder and to life imprisonment for armed robbery.

Petitioner did not file a motion for new trial. On direct appeal, the Supreme Court of Georgia found the following facts:

> Christenson spent most of the afternoon of July 6, 1989 working out at a gym next door to the victim's place of employment. After his workout, he waited in front of the gym, carrying a gym bag inside of which were two handguns. His parents drove by and asked him if he needed a ride. He answered in the negative. Soon afterward, the victim exited the building next door and went to his four wheel drive Toyota utility vehicle, which contained a several-thousand dollar, competition-quality stereo system big enough to almost completely fill the luggage area of the vehicle. Christenson was acquainted with the victim, and approached him to ask for a ride to a friend's house. Christenson's parents observed him enter the victim's truck and ride off.

> Christenson directed the victim to a remote area of Harris County, and withdrew a gun from his bag. According to Christenson, a struggle for the gun ensued, the truck came to a stop, the passenger door fell open, and the two men fell out to the ground. Christenson gained control of the gun and shot the victim five times. Then he stuffed the victim's body into the passenger side of the truck, drove off the highway 100 yards, and left the body, covered with sticks and brush. He drove the victim's truck to Arkansas where he was arrested the next day for stealing gasoline. He called home to ask his father for money to post his bond. His father contacted the local police, who called Arkansas and informed them the truck was stolen and its owner missing. The defendant was interrogated in Arkansas and admitted the truck was stolen, although he denied stealing it. After the victim's body was recovered, the defendant admitted stealing the truck and shooting its owner.

Christenson v. State, 261 Ga. 80, 81, 402 S.E.2d 41 (1991).

The Supreme Court of Georgia affirmed Petitioner's convictions and his life sentence on direct appeal and remanded the death sentence to the trial court for further proceedings on two sentencing phase evidentiary issues. *Christenson*, 261 Ga. 80. That court denied Petitioner's motion for reconsideration on March 27, 1991, *id.*, and this Court denied his petition for writ of certiorari on October 7, 1991. *Christenson v. Georgia*, 502 U.S. 855, 112 S.Ct. 166 (1991). Following remand hearings, the Superior Court of Harris County entered an order upholding Petitioner's death sentence on the two sentencing phase issues before it on remand, and on December 2, 1992, the

Supreme Court of Georgia affirmed the lower court's findings of fact and conclusions of law on remand and affirmed Petitioner's death sentence. *Christenson v. State*, 262 Ga. 638, 423 S.E. 2d 252 (1992). The Supreme Court of Georgia denied Petitioner's motion for reconsideration on December 17, 1992, *id.*, and this Court denied his petition for writ of certiorari on May 13, 1993. *Christenson v. Georgia*, 508 U.S. 927, 113 S.Ct. 2388 (1993).

Petitioner then filed his petition for writ of habeas corpus in the Superior Court of Butts County on or about October 31, 1995. Respondent filed responsive pleadings on or about November 8, 1996. Petitioner's amended petition was filed on or about May 3, 1996, and following the filing of further responsive pleadings, an evidentiary hearing was conducted in this matter on June 4, 5, and 6, 1996 and on June 18, 1996.

On April 14, 1997, the habeas corpus court entered an order granting Petitioner's application for writ of habeas corpus as to the death sentence and vacating the death sentence. The habeas corpus court based its grant of habeas corpus relief on the ground of ineffective assistance of counsel which the habeas court found rendered the sentencing phase of trial unreliable. The habeas court ruled that counsel performed unreasonably throughout trial but concluded that counsels' performance resulted in prejudice to Petitioner only at the sentencing phase of trial, finding that Petitioner did not meet the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), with regard to the guilt/innocence phase of trial. Respondent appealed from the habeas corpus court's order finding ineffective assistance of counsel and

granting habeas corpus relief as to Petitioner's death sentence.

Petitioner cross-appealed, asserting error in the portions of the habeas corpus court's order adverse to him and in the failure of the habeas court to find that Petitioner suffered prejudice at the guilt/innocence phase of trial from what the habeas corpus court had found to be counsels' unreasonable performance and to grant Petitioner a new trial as to guilt/innocence as well as sentencing.

The Supreme Court of Georgia affirmed the habeas corpus court's finding of ineffective assistance of counsel resulting in prejudice to Petitioner at the sentencing phase of trial and the resulting grant of habeas corpus relief as to the sentencing phase of trial. The Court also affirmed the habeas corpus court's finding that Petitioner did not meet the prejudice prong of *Strickland v. Washington* with regard to the guilt/innocence phase of trial, ruling that the evidence of Petitioner's guilt was "overwhelming." *Turpin v. Christenson*, 269 Ga. 226, 497 S.E.2d 216 (1998). On April 1, 1998, the Supreme Court of Georgia denied motions for reconsideration filed by Respondent as Appellant and by Petitioner as Cross-Appellant. *Id.*; Appendix to Petitioner's Brief, A. 26 and A. 27.

Petitioner has now filed the instant petition seeking review of the decision of the Supreme Court of Georgia applying this Court's well-established precedent, set forth in *Strickland v. Washington*, 466 U.S. 668, to the specific facts of Petitioner's case and concluding on those specific facts that Petitioner failed to satisfy the prejudice prong of the *Strickland v. Washington* analysis so as to

establish ineffective assistance of counsel at the guilt/innocence phase of his trial and to secure guilt/innocence phase habeas corpus relief thereon.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION OF THE SETTLED PRECEDENT OF THIS COURT TO THE PARTICULAR CIRCUMSTANCES OF PETITIONER'S CASE.

This Court has repeatedly held that it will not exercise its certiorari jurisdiction merely to review a decision of a state court turning upon an analysis of the particular facts involved. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437 (1974); *Texas v. Mead*, 465 U.S. 1041, 104 S.Ct. 1318 (1984); *United States v. Johnston*, 268 U.S. 220, 45 S.Ct. 496 (1924). Respondent submits that it is precisely this type of decision which Petitioner now asks this Court to grant certiorari to review.

The decision of the Supreme Court of Georgia which Petitioner asks this Court to review applied the clear legal precedent of this Court as contained in its decision in *Strickland v. Washington*, 466 U.S. 668, to the specific facts of Petitioner's case. In reviewing the facts of Petitioner's case and Petitioner's claim of ineffective assistance of counsel, the Supreme Court of Georgia set forth the applicable precedent to be applied to Petitioner's claim as follows:

A claim of ineffective assistance of counsel is grounded in the general right to counsel guaranteed to criminal defendants by the Sixth Amendment to the United States Constitution and Article I, Section I of the Georgia Constitution. Appellate courts apply a two-pronged test to determine if counsel's [sic] performance was ineffective as to require reversal of a conviction or a death sentence:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, supra at 687. The Supreme Court of Georgia adopted the *Strickland* test in *Smith v. Francis*, 253 Ga. 782, 325 S.E.2d 362 (1985). For Christenson to show that his trial counsel's (sic) performance was defective, he must demonstrate that his trial counsel's (sic) performance was not reasonably effective in light of the circumstances confronting his counsel before and during the trial. *Smith*, supra at (1). Hindsight is not employed, and Christenson's counsel is afforded a strong presumption

> that their conduct fell within a wide range of reasonable professional conduct and that their significant decisions were made in the exercise of reasonable professional judgment. Id. In order to show prejudice, Christenson must demonstrate that "there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. Christenson must show both defective representation and prejudice in order to prevail on this claim.

Turpin v. Christenson, 269 Ga. at 231-232.

In reviewing the specific facts of Petitioner's case and applying this Court's precedent set forth in *Strickland v. Washington*, 466 U.S. 668, and adopted by the Supreme Court of Georgia in *Smith v. Francis*, 253 Ga. 782, the Supreme Court of Georgia held as follows:

> Pretermitting the question of defective representation in the guilt/innocence phase, we find the habeas court did not err by ruling that Christenson cannot meet the prejudice prong of *Strickland*. Although Christenson's counsel's (sic) preparation for and conduct of the guilt/innocence phase included errors and omissions, the evidence of Christenson's guilt was overwhelming. The jury heard, read and saw Christenson admit to killing Oliver in several separate statements, all later held to be admissible by this Court. *Christenson I*, supra at (3). Christenson was the last person seen with Oliver, and Christenson was arrested the following day driving Oliver's truck in another state. There was blood in the truck and on Christenson's clothes. Christenson cannot show that there was a reasonable

> probability that, but for trial counsel's (sic) errors, he would not have been convicted. See *Strickland*, supra; *Smith*, supra. We therefore affirm the habeas court's ruling on Christenson's convictions.

Id. at 233-234 (footnote omitted).

Respondent submits that the Supreme Court of Georgia fully considered and correctly decided the issues now presented by Petitioner and that the decision of the Supreme Court of Georgia on the issue of ineffective assistance of counsel and the question whether Petitioner established prejudice as to the guilt/innocence phase of Petitioner's trial represents no departure from or expansion of this Court's clear guidance for determining such issues set forth in *Strickland v. Washington*, 466 U.S. 668, but rather is merely an application of the legal principles set forth by this Court in that decision to the specific facts of Petitioner's case. Thus, this Court should decline to grant certiorari.

This Court should decline to exercise its certiorari jurisdiction in cases such as Petitioner's in which the petitioner simply asks this Court to review whether the lower court erroneously determined that the facts of his particular case failed to satisfy both prongs of the test for ineffective assistance of counsel set forth by this Court in *Strickland v. Washington*, 466 U.S. 668. As this Court has instructed, "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. at 617. Thus, a claim such as Petitioner's that the Supreme Court of Georgia's decision was

"incorrect" is insufficient to motivate the exercise of this Court's certiorari jurisdiction.

Petitioner's case presents no question of paramount importance or widespread application, nor is it a case of first impression for this Court's review. Instead, Petitioner seeks to invoke the certiorari jurisdiction of this Court to review the mere application of this Court's settled legal precedent, set forth in *Strickland v. Washington*, 466 U.S. 688, to the particular facts of Petitioner's case.

While Respondent maintains that the Supreme Court of Georgia correctly applied this Court's legal precedent to the facts of Petitioner's case in holding that Petitioner failed to establish the prejudice prong of the ineffective assistance of counsel analysis with regard to the guilt/innocence phase of Petitioner's trial, this Court does not in any event operate simply to correct errors in fact-finding made by lower courts. As this Court stated in *United States v. Johnston*, 268 U.S. at 227, "We do not grant a certiorari to review evidence and to discuss specific facts." Under these circumstances, there is no legitimate basis warranting this Court's grant of certiorari in this matter.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny this petition for a writ of certiorari as Petitioner merely seeks review of a fact-specific application of the settled legal precedent of this Court.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1997

SCOTT LYNN CHRISTENSON

Petitioner,

—v.—

TONY TURPIN, Warden
Georgia Diagnostic and Classification Center,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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August 18, 1998

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IN THE

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner, Scott Lynn Christenson, respectfully submits this reply brief in support of his petition for a writ of certiorari (the "Petition") to review the judgment of the Supreme Court of the State of Georgia, entered by the Butts County Superior Court on April 28, 1998.

I.

THE PETITION RAISES A FUNDAMENTAL QUESTION OF LAW OF PARAMOUNT IMPORTANCE FOR THIS COURT'S REVIEW.

Contrary to the contentions in respondent's brief in opposition to the Petition, the Petition raises a fundamental question of law of paramount importance for this Court to decide: Whether the knowing assertion of a baseless defense that could only mystify, and, in the description of trial observers, "shock and anger" the jury, constitutes ineffectiveness of counsel that is so prejudicial as to undermine any confidence in the fundamental fairness and outcome

of the trial. *See Wade* v. *Calderon*, 29 F.3d 1312, 1325 (9th Cir. 1994) (granting *habeas corpus* relief because, *inter alia*, counsel's defense theory was "presented in a manner that clearly risked alienating the jury"), *cert. denied*, 513 U.S. 1120 (1995); *Young* v. *Zant*, 677 F.2d 792,798 (11th Cir. 1992) (granting *habeas corpus* relief because "competent counsel would not have gone to trial on an insanity defense without evidence to support it"); *House* v. *Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984). Respondent mischaracterizes the matters at issue here in asserting that the Petition asks this Court to review the factual findings of the habeas court or the Georgia Supreme Court. To the contrary, the Petition asks this Court to address an important constitutional issue about what it means to have a trial that affords a defendant the "fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941).

The operative facts were found by the habeas court and, contrary to respondent's assertions, are not challenged here. Specifically, the habeas court found, "based on the trial record and the testimony at the habeas corpus hearing," (A39) that Mr. Christenson's counsel had no basis to represent to the jury that the defense would prove that "Oliver was killed when Christenson attempted to trade guns for drugs and Oliver made a sexual advance to him." (A71). The Georgia Supreme Court sustained the habeas courts' findings, concluding in relevant part: "In his opening statement, Mr. Kirby told the jury that the defense would show that Mr. Oliver, the victim, had been a drug dealing homosexual who had initiated the events which led to his death by attempting to trade sex for drugs. As the trial progressed, it became apparent that trial counsel had virtually no evidence to support this characterization of the victim." (A9).

Under the approach articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), this Court applies a two-pronged test to determine whether the performance of counsel is so deficient as to abridge a defendant's Sixth Amendment rights. As detailed in the Petition, Mr. Christenson has satisfied both prongs of that test with respect to *both* the death sentence *and* his murder conviction. Mr. Christenson's court-appointed defense counsel, William Kirby and Richard Bunn, alienated the jury from the outset of trial by

making representations to the jury that they knew to be both baseless and defamatory to Mr. Christenson and the victim. Trial counsel's performance was, therefore, deficient and prejudicial within the meaning of *Strickland*, and Mr. Christenson's conviction should be vacated.

Respondent erroneously asserts — as did the courts below — that Mr. Christenson's murder conviction must stand notwithstanding this farcical defense because the evidence of his guilt was "overwhelming." (Brief in Opposition on Behalf of Respondent at 7 (quoting *Turpin v. Christenson,* 269 Ga. 226, 233, 497 S.E.2d 216, 223 (1998)).) Although the prosecution was permitted to introduce at trial several inculpatory statements that Mr. Christenson had made while in custody, those statements demonstrated only that Mr. Christenson had admitted to having shot Mr. Oliver in the course of a struggle. The issue for the jury — the very jury that had been alienated by defense counsel's fabrications and prejudicial depictions of Mr. Christenson on an extended videotape — was not simply whether Mr. Christenson had shot Mr. Oliver, but whether the conduct Mr. Christenson described constituted capital murder.* Had they not been poisoned by the constitutional deprivations and the other deficiencies found by the *habeas* court, there is a reasonable probability that the jury would have decided not to convict Mr. Christenson of murder.

Indeed, reduced to its essence, respondent's argument would eviscerate not only the fundamental right to a *fair* trial, but the right to *any* trial in a criminal case. Under respondent's reasoning, a defendant who had admitted to some involvement in the death of the victim would suffer no prejudice even if he were adjudged guilty of murder without any trial at all. Such an absurd result plainly is not the law.

---

* Indeed, defense counsel had requested, but — in part, because of their deficiencies of preparation and presentation — failed to obtain, a jury instruction as to the lesser included offense of voluntary manslaughter.

Moreover, respondent's position would both deprive Mr. Christenson of the constitutional presumption of innocence and undermine the requirement that the prosecution prove all elements of its charges beyond a reasonable doubt. Proof that Mr. Christenson was involved in Mr. Oliver's death does not establish that Mr. Christenson committed murder. Such a determination may be made only by the jury — an impartial, untainted jury — after finding that the prosecution had proved all of the elements of that crime beyond a reasonable doubt, including establishing that the defendant had acted "unlawfully and with malice aforethought." Ga. Code Ann. § 16-5-1(a). Defense counsel's prevarications and other deficiencies prejudiced the jury against Mr. Christenson from the outset of, and throughout, the trial; and made such a dispassionate determination impossible.

Moreover, the adequacy of Mr. Christenson's representation, just as the fairness of Mr. Christenson's capital proceedings, should also be reviewed as a whole, rather than merely examined in isolation with respect to each "phase" of the trial. The Superior Court found, and the Georgia Supreme Court affirmed, that Mr. Christenson's trial counsel were deficient during all "phases" and aspects of Mr. Christenson's trial, from pre-trial preparation, through the trial as to guilt or innocence, and during the sentencing proceedings. (A8-A21; A66-A76) The cumulative impact of that pervasive ineffectiveness deprived Mr. Christenson of his constitutional right to a fair trial. *See Lundy* v. *Campbell*, 888 F.2d 467, 472-73 (6th Cir. 1989); *Cooper* v. *Sowders*, 837 F.2d 284, 288 (6th Cir. 1988); *Walker* v. *Engle*, 703 F.2d 959, 968 (6th Cir.1983); *cf. Derdon* v. *McNeel*, 978 F.2d 1453, 1455-58 (5th Cir. 1992) (adopting the majority rule on cumulative error with certain limitations); *United States* v. *Rivera*, 900 F.2d 1462, 1477 (9th Cir. 1990) (concluding after a review of the record that there was no cumulative error such that defendant was denied his right to a fundamentally fair trial).

The cumulative effect of the errors by Mr. Christenson's trial counsel, including the failure to request a curative instruction for the introduction of a videotape showing Mr. Christenson in shackles and jail attire, was so "prejudicial to [Mr. Christenson] that reversal is warranted." *United States* v. *Wallace*, 848 F.2d 1464, 1478 (9th

Cir. 1988). As this Court has admonished, "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba*, 314 U.S. at 236. The record here establishes that Mr. Christenson did not receive his constitutional right to a fair trial.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Court should grant certiorari and reverse the decision of the Supreme Court of Georgia with respect to the questions presented in the Petition.

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